Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

PORTIA BASS,

Petitioner,

v.

E.I. DUPONT DE NEMOURS AND COMPANY,

Respondent.

Petition For a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is it an abuse of discretion to award costs and attorney fees to an employer, that are in excess of a Title VII/Age Discrimination in Employment Act plaintiff's total income and does it have a chilling effect on future discrimination claims?

2. Where, in defending against an employer's summary judgment motion to proceed to the jury, a Title VII and Age Discrimination in Employment Act plaintiff establishes a prima facie case and presents evidence showing the employer's explanation for its adverse acts to be false, can a court decide the ultimate issue of discriminatory intent?

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In The
SUPREME COURT OF THE UNITED STATES

PORTIA BASS,

Petitioner,

v.

E.I. DUPONT DE NEMOURS AND COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Portia Bass, Petitioner, by counsel respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals of the Fourth Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fourth Circuit, *Bass v. E.I. DuPont de Nemours and Co.*, 324 F.3d 761 (4th Cir. 2003) is reported and reproduced at App. 1-13 . The order of the U.S. Court of Appeals for the Fourth Circuit denying petitioner's application for a rehearing en banc is unreported and reproduced at App. 14. The unreported order and opinion of the United States District Court for the Western District of Virginia, granting the employer summary judgment, is reproduced at App. 15-16,17-34 The District Court order and opinion assessing costs against Ms. Bass is unreported and is reproduced at App. 35-36, 37-41 The District Court Order and Opinion assessing attorney fees is unreported and is reproduced at App. 42-43, 44-58.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on March 26, 2003. App. 1. A timely petition for rehearing en banc was denied on April 28, 2003. App. 14. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This cases involves the following provisions: 42 U.S.C. §1988(b) and 28 U.S.C. §1920. The pertinent provisions of the statutes are set for in the appendices at App. 59

STATEMENT OF THE CASE

Petitioner, Ms. Bass, an African American female chemist with a Master of Science in Chemistry who was over the age of 40, worked for the employer as a chemist for 15 years. J.A. 24- 25[1]. Seven of those years she held the position of Global Lycra Strategic Business Unit Toxic Substances Control Act[2] Coordinator. J.A. 389. As such, she was responsible for compliance with TSCA for all of the employer's 15 Lyrca sites in the U.S. and overseas. J.A. 575. Her responsibilities included negotiating with the EPA, J.A. 296,289-290; issuing chemical regulatory policy statements for the global Lycra business, J.A. 297; handling international chemical regulatory issues, J.A 124-125,548; obtaining

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[1] J.A. denotes the Joint Appendix filed in the Court of Appeals for the Fourth Circuit.

[2] Toxic Substances Control Act (TSCA), 15 U.S.C. §2601 et seq.

clearance for new research and development chemicals, J.A 575; collaborating with foreign government agencies, J.A 124-125; and working on the corporate level across many sites and areas such global sourcing, J.A 575-578.

Ms. Bass worked as a member of a group of SBU[3] TSCA[4] Coordinators. J.A.545) They functioned as the regulatory arm of the employer. J.A. 131, 545. They all used the same databases, J.A. 163; they prepared public policy statements to the United States Environmental Protection Agency, J.A. 131; they were all responsible for compliance with, TSCA J.A. 131; they collaborated on projects and issues, J.A. 296,289,553,568; they worked across one another's SBUs, J.A. 294,550. The employer compared all of them for salary purposes. J.A. 576. Of this group, she was the lowest paid, J.A. 528-542, and received the least resources, J.A. 273.

Without a word of warning in July 1998, Ms. Bass was demoted from her position. J.A. 389,399. She was replaced with a white female under the age of 40 with only a Bachelor of Science in Biology, who had no TSCA experience whatsoever. J.A. 389,396-397. The employer claimed that she was removed from the position for poor performance reasons but admitted that no one in the company ever told her about them or ever told anyone else in the company. J.A 369. Even the employer's own human resources manager stated that the employer was lacking in credibility. J.A. 411. The entire time Ms. Bass held the SBU TSCA Coordinator position, her salary targets steadily increased, showing that the employer considered her to be

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[3] SBU denotes Strategic Business Unit.

[4] TSCA denotes Toxic Substances Control Act.

satisfactorily performing her job. J.A. 370,373,388. After the demotion she was relegated to the clean up of lead and asbestos at one site. J.A. 225.

In March of 1999, the employer commanded Ms. Bass to resume her previous duties, while her replacement remained in the job. J.A. 406. The employer further ordered her to sign off on the safety of hazardous chemicals, while prohibiting her from contacting the research chemist, visiting the research lab, having access to the TSCA information or even knowing what the chemical actually was. J.A. 25. Ms. Bass complained of a hostile environment. J.A. 405-407. She asked and was permitted to move to another office, where she continued to carry out her duties. The employer assembled an internal team of four persons, based upon their immutable characteristics of race and gender to investigate. At the first meeting with Ms. Bass, the team merely asked her initial questions and nothing more. J.A. 283. She was forced to repeatedly ask what was happening. J. A. 283. The team interviewed people, whom they classified by race, J.A 460-461, who had nothing to with Ms. Bass, such as a retired secretary, an administrative assistant, a non-exempt employee relations person, and manufacturing persons. J.A 460-461. During this time, the employer had a mental health professional, who never examined Ms. Bass and whose treatment was never sought by her, give training sessions on her mental instability to groups of people. J.A. 434-435. The team never told Ms. Bass of any findings, only that it was over. J.A. 283. Ms. Bass then filed a charge with the EEOC. She was fired less than 30 days later. Right up until the time of her firing, she was performing her duties. J.A. 308-356.

Ms. Bass, filed an action in a federal district court against her employer under Title VII of the Civil Rights Act of

1964, 42 U.S.C. §§2000e et seq., alleging discrimination and retaliation; the Equal Pay Act, 29 U.S.C. §206(d); and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621 et seq. The district court granted the employer's motion for summary judgment. App. 15. The district court further awarded the employer costs of $3,627.26, under 28 U.S.C. §1920. App. 35. In addition, the district court awarded the employer attorneys' fees of $10,968.69, under 42 U.S.C. §1988(b). App. 42. The combined awards are nearly 2.5 times her total income of $6,606 J.A. 606.

REASONS FOR GRANTING THE WRIT
A

I. There Is a Split within the Fourth Circuit

There are two opinions originating from two different panels within the Fourth Circuit, which establish two inapposite standards with regard to the assessment of attorneys' fees against a civil rights plaintiff. In *Debauche v. Trani,* 191 F.3d 499 (4th Cir. 1999), the Fourth Circuit vacated an attorneys' fee and cost award under 42 U.S.C. §1988(b) against a 42 U.S.C. §1983 plaintiff. That Panel reasoned that the district court could not have taken into account Debauche's financial means because it awarded $48,000 in costs and fees, when she had earned less than $42,000 in the combined three years preceding the award. Yet, in *Bass v. DuPont*, 324 F.3d 761 (4th Cir. 2003), App. 1-13, the Fourth Circuit affirmed an attorney fee award under 42 U.S.C. §1988(b) and a cost award under 28 U.S.C. §1920 of $14,595.95 , when Ms. Bass only earned $6,606 in the year preceding the award. When the employer unlawfully fired her, she suffered an abrupt and complete loss of all of her income. For the two years preceding the award and for the two years subsequent to her firing, her income has been below the poverty line. J.A. 605,606. At this point, she is bankrupted. The *Bass* Panel expressly noted that the awards would be "a substantial financial burden upon her," but nevertheless affirmed the awards on the ground that they had already been reduced. App.10.

These two published opinions cannot be reconciled. There is now an immense amount of confusion because the standard to be applied depends upon the presiding panel and not the law as it differs with each panel. When the two opinions are laid side by side, two different results obtain for the same

plaintiff. Under *Debauche*, a civil rights plaintiff will not be forced into financial ruin by a fee and cost award; but not so under *Bass*. The mere fact that the employer's fee and cost request was reduced does not address the issue that the amount awarded forces Ms. Bass into financial ruin. The *Bass* Panel not only overruled the *Debauche* Panel, but established an entirely new standard for the assessment of attorney fees and costs against a civil rights plaintiff. The *Bass* Panel removed the civil rights plaintiff's ability to pay as a determinative factor in assessing fees and costs. In no arena of the financial world is the applicant's ability to pay irrelevant. Logic demands that Ms. Bass' inability to pay is not irrelevant to the inquiry. For after all such awards should be directed at the individual, therefore the individual's financial circumstances must be the critical factor because the effect of a particular award of a certain amount on a particular individual depends upon the financial circumstances of the individual to whom the award is directed.

Furthermore, in every circuit, the rule is that a panel within a circuit may not overrule, explicitly or implicitly, precedent set by a prior panel of that circuit.[5] Only a U.S. circuit court of appeals en banc or the U.S. Supreme Court can

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[5] *U.S. v. Chhien,* 266 F.3d 1,11 (1st Cir. 2001); *In re Sokolowski,* 205 F.3d 532,534 (2nd Cir. 2000); *In re Continental Airlines Inc.,* 279 F.3d 226,233 (3rd Cir. 2002); *Mentlavos v. Anderson,* 236 F.3d 301,312 n.4 (4th Cir. 2001); *Reickenbacker v. Foster,* 274 .3d 974,977 (5th Cir.2002); *U.S. v. Roper,* 266 F.3d 526,530 (6th Cir. 2001); *Brooks v. Hall,* 279 F.3d 518,522 (7th Cir. 2002); *Hart v. Massanari,* 266 F.3d 155,1171 (9th Cir. 2001); *Owsley v. Luebbers,* 281 F.3d 687,690 (8th Cir. 2002); *In re David L. Smith,* 10 F.3d 723,724 (10th Cir. 1993); *Walker v. Southern Co. Serv. Inc.,* 279 F.3d 1289,1293 (11th Cir. 2002); and *Nat'l Council of Resistance v. Dep't of State,* 251 F.3d 192,198 (D.C. Cir. 2001).

overrule a decision by a panel. *Id.* This procedure is necessary to ensure uniformity. As neither the Fourth Circuit en banc nor this Court has overruled *Debauche*, the decision of *Bass v. Dupont* cannot stand. The mandated procedure for overruling the set precedent of *Debauche*, that an attorney fee and cost award should not force a civil rights plaintiff into financial ruin, was not followed. Thus, *Debauche* is still the law. As a necessary consequence, the *Bass v. Dupont* decision is void. If parties who come seeking redress before the judicial system cannot be assured that the established procedures and standards will be followed, chaos will result. It means the destruction of faith in the American law, in the American courts, and in American principles.

II. The *Bass v. Dupont* Decision Has a Chilling Effect on Civil Rights Actions

The published decision of *Bass v. Dupont* effectively eradicates the force of Title VII and the ADEA. It wipes from the hearts and minds of future plaintiffs the very idea that they can exercise their rights and even hope to survive. No one will ever come forward in the face of this decision. When Congress enacted Title VII, it intended individuals to act as private attorney generals in the war to eradicate discrimination in the workplace. *EEOC v. Associated Dry Foods Corp.*, 449 U.S. 590,601-02, 101 S.Ct. 817,824 (1981). An award of attorneys' fees to a prevailing employer has a chilling effect upon Title VII/ADEA plaintiffs. *Christianburg Garment Co. v. Equal Employment Opportunity Comm'n,* 434 U.S. 412,421-22, 98 S.Ct. 694,700 (1978). In this case, Ms. Bass is faced with an award, which is almost 250 percent of her gross income and which totally and permanently destroys her financially. Ms. Bass' sole shield against injustice was the legal principles that: (1) that an attorney fee award should not force Title VII

plaintiffs into financial ruin, *Debauche v. Trani,* 191 F.3d at 511; and (2) that costs may be denied to a prevailing party, where there would be an injustice in the award, *Cherry v. Champion Int'l Corp.*, 186 F.3d 442,449 (4th Cir. 1999). That shield has been blown to smithereens. No bank would loan Ms. Bass $14,595, when all of her income does not even rise above $6,606, which is below the poverty line, and as her financial disclosure documents reveal that she has no assets, S.J.A. 44-47[6]. But yet the *Bass* Panel in its decision proclaimed that it was irrelevant that Ms. Bass did not have the ability to pay the awards.

The implications of the attorneys' fee and cost awards extend far beyond the person of Ms. Bass because the awards have nothing to do with her personal status. Rather, the decision is directed at sending a message to future plaintiffs. One thing is inescapable. The people have been sent a message that unless they win their civil rights cases, they have no defense in law or in reason against costs and attorney fees. A standard for awards of attorneys' fees and costs against a Title VII plaintiff, which does not have at its foundation the financial means of the civil rights plaintiff, wreaks havoc upon Congress' intent to promote the vigorous enforcement of Title VII, *Id.* 434 U.S. at 422, 98 S.Ct. at 701. Any person reading the *Bass v. DuPont* opinion would be terrified into the non-exercise of their civil rights because the judiciary will require her to do the impossible and pay what she does not have and what is more cannot obtain. The risk has become unbearable. The people upon whom Title VII and the ADEA depends for enforcement have been frightened away from the courthouse doors. A right cannot exist without a remedy. A remedy cannot exist if the

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[6] S.J.A. denotes the Supplemental Joint Appendix filed in the Court of appeals.

people are afraid to seek it. In effect, the power of Congress to ban discrimination has been taken away. Title VII and the ADEA have been reduced to nothing more than words on paper.

III. The New Irrebuttable Presumption Standard

The *Bass v. Dupont* decision creates a new standard of an irrebutable presumption, which violently conflicts with firmly established precedent and chills claims of future discrimination victims. Fed. R. Civ. P. 54(d)(1) permits costs to be awarded to a prevailing party only when those costs were "necessarily obtained for use in the case". 28 U.S.C. §1920. A federal Court may only tax those costs enumerated in 28 U.S.C. §1920. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437,441-42, 107 S.Ct. 2494,2497 (1987). A bill of costs must be given careful scrutiny. *Farmer v. Arabian Oil Co.*, 379 U.S. 227,235, 85 S.Ct. 411,416 (1964). In order for costs to be taxed, the employer must produce documentation showing what the specific items were, what the costs were for, and explaining how the items were necessary for the litigation. *English v. Colorado Dep't of Corr.*, 248 F.3d 1002, 1013 (10th Cir. 2001). A bare assertion that items were necessary to the litigation is insufficient. *Id*

The employer failed it meet its burden to prove its costs. The District Court found that the employer only provided a sparse description of the copies for which it claimed costs, that it was difficult to determine what copies were used as exhibits or furnished to the court or opposing counsel, and that it was hard pressed to find that the employer's volume of copies was necessarily obtained for use in the case. App. 39,41. The district court further found that the employer did not order a transcript in time for it to be of use for the employer's claimed purpose of need for the transcript in the preparation of its

appellate brief but sua sponte surmised that the transcript could have been used later for the oral argument. App. 40. In addition, the employer did not explain how it could have used a transcript for a hearing in Roanoke, Virginia that was delivered in Charlottesville, Virginia the very day of the Roanoke hearing J.A. 10 n. 75, 594. Nevertheless, the district court allowed costs for the transcripts and the copies.

The affirmance of this cost award is a manifest injustice. Clearly, as the District Court's difficulties in determining what the costs were for indicate, the employer did not meet its burden of proving the costs. Yet, the cost award was affirmed, in absence of the required evidence showing exactly what the costs were for and that they were necessary to the litigation. Therefore, the new standard is one of an irrebuttable presumption because no proof is required. Furthermore, the fifty percent reduction of the employer's claimed costs does nothing toward the fact that the employer did not and could not meet its burden of proof. For a fifty percent of non-proven costs is fifty percent of expenses, which the employer did not prove that it spent. In other words, the employer was given the benefit of recovering unexpended costs.

Costs and attorney fees are facts just like any other facts which must be proved and cannot be presumed. A prevailing party may recover only those attorneys' fees that were reasonably expended on the litigation. *Hensley v. Eckerhart*, 461 U.S. 424,433-34, 103 S.Ct. 1933,1939 (1983). The determination of a reasonable fee award involves a two-step process. *Id.* 461 U.S. at 433, 103 S.Ct. at 1939. First, the court must determine the lodestar by multiplying the reasonable number of hours expended and the reasonable hourly rate for each participating attorney. *Id.* A court can consider various factors such as the following: the nature and the extent of the

services supplied, the customary hourly rate of compensation, the number of hours expended, the skill required, and the complexity of the case. *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343,1359 (4th Cir. 1995).

It is undisputed that 88.1 hours of the 135 hours that the employer's three attorneys claimed they spent on the wage discrimination claim were completely unaccounted for in their time sheets. Attorney one claimed a total of 28 hours for work that was not even listed in the time sheets: 18.2 hours for work on the 42 U.S.C. §1985(3) claim, which was dismissed under Fed. R. Civ. P. 12(b)(6), S.J.A. 48; yet there is only one entry of .8 of an hour in the time sheets for the claim, S.J.A. 62. He also claimed to have spent 9.8 hours on the Title VII wage discriminations claims, S.J.A 48, yet there is no mention in the time sheets at all of any such services by him, S.J.A 49-104. Attorney one further claimed to have spent time reviewing Ms. Bass' discovery requests before they were served upon him. S.J.A. 74, 105,106. Attorney two claimed 5.1 hours on the wage discrimination claims, yet there is no mention of any such service provided by him in the time sheets. S.J.A. 48,49-104. Attorney three claimed 107.4 hours on the wage claims, when only 50.4 hours can even facially be attributed to the claims. S.J.A. 48,49-104. Of the remaining 50.4 hours, she claimed that to have spent 7.8 hours traveling 120 miles one way to from Charlottesville, Virginia to Roanoke, Virginia. S.J.A. 104.

Moreover, a review of the time sheets shows that it is impossible to determine which of the numerous hourly rates for each of the three attorneys were charged for what specific task. The award runs afoul of the lodestar formula because it found that it was reasonable to award fees for a substantial number of hours that were glaringly absent from the time sheets of the employer's counsel. The district court's reduction of the fee

does not cure the infirmity of the award because it gave the employer fifty percent of attorney fees that were not proven to have been expended. Therefore, the employer's counsel was unjustly enriched as it was awarded fees that it did not earn. The affirmance of the fee award necessarily means that proof of attorney hours and rates is irrelevant to the inquiry. A prevailing party no longer has to meet a burden of proof with respect to costs and attorney fees. If proof of hours is not required, the employer's bare assertion of attorney fees is unsusceptible to attack. Because the claim for fees cannot be attacked, there is an irrebuttable presumption in favor of all prevailing parties.

No discrimination victim will ever bring a claim because he or she has been put on notice by *Bass v. Dupont* that, if the case is lost, the employer has an absolute and unchallengeable right to whatever attorney fees and costs it claims. The people's belief in Title VII, the ADEA, and the administration of the judicial system has been destroyed.

IV. The Equal Pay Act and Wage Discrimination Claims by Definition Could not be Frivolous

Because the issue of Ms. Bass' wage discrimination claims on summary judgment hinged upon the credibility of the parties, both the District Court and the Fourth Circuit were without authority to determine the merits of the claims and conclude that they were frivolous. The employer states that the only evidence of the comparator's job duties was their affidavits and Ms. Bass' affidavit and testimony. (Appellee Brf. Ct. App. 44)[7]. Thus, the issue of whether the comparators' jobs were

[7] Brief of Appellee filed in the court of appeals.

similar depended upon the weight ascribed to the affidavits of the comparators' and that of Ms. Bass. The employer's admission resolves the issue of the claim's frivolousness in Ms. Bass' favor. For the only way to decide the issue was to believe one side over the other. That is the very definition of a credibility determination. Because the wage discrimination claim and Equal Pay Act claims were at the summary judgment stage; that credibility determination was the sole province of the jury. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,248 106 S.Ct. 2505,2510 (1986). In finding that Ms. Bass' claims were frivolous, the Fourth Circuit necessarily usurped and invaded the province of the jury.

Furthermore, Ms. Bass's wage discrimination claim by definition could not have been frivolous. The definition of frivolous is to be without foundation. *Christianburg Garment Co. v. Equal Employment Opportunity Comm'n,* 434 U.S. 412,421, 98 S.Ct. 694,700 (1978). The employer refused to provide job descriptions for the comparators on the ground that it did not have any. J.A. 570. In addition, the employer admitted that Ms. Bass and the comparators performed the same TSCA functions, Appellee Brf. Ct. App. 44; thus, their duties overlapped. In addition, it is undisputed that the employer compared the comparators, including Ms. Bass, for salary purposes. J.A. 546,576. Clearly as the duties overlapped and the comparators had already been compared, Ms. Bass' claims were based upon a solid foundation.

B

I. Ms. Bass' Discrimination Claim Was a Jury Question

The court of appeals expressly found that Ms. Bass established a prima facie case of discrimination under Title VII and the ADEA. App. 9. After seven years as the Global Lycra SBU[8] TSCA[9] Coordinator, Ms. Bass was summarily removed from her position. J.A. 389,399. The employer claimed that it demoted Ms. Bass due to poor performance reasons. Yet, it admitted that it never told her about these supposed problems nor anybody else, in the entire corporation. J.A. 369. Indeed, the court of appeals found that Ms. Bass was never informed of these supposed performance problems prior to the reassignment. App. 3. Specifically, the court of appeals found that Ms. Bass had been "consistently promoted, given increasing responsibilities, and told that her performance was satisfactory." App. 3. Moreover, her replacement had no knowledge of TSCA or the employer's business whatsoever. J.A. 396-397. Furthermore, Gary Thomas, a human resources manager, stated that the employer had "a gap in credibility" on these performance issues. J.A. 411. In addition, the vice-president of human resources, Bill Madison, stated that Ms. Bass' demotion could be construed as discrimination. J.A. 414.

Under the *McDonnell Douglas* standard, once the employee establishes a prima facie case of discrimination, the burden shifts to the employer to articulate a nondiscriminatory reason for taking the adverse employment action against the

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[8] SBU denotes Strategic Business Unit.

[9] Toxic Substances Control Act, 15 U.S.C. §2601 et seq.

employee. *McDonnell Douglas Corp. v. Green,* 411 U.S.792,802-804, 93 S.Ct. 1804,1824-1825; *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502,507, 113 S.Ct. 2742,2747 (1993). Only after the employer successfully meets its burden, does the burden shift back to the employee to put forth evidence to allow a jury to find that the employer's reason was pretextual. *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. at 509 113 S.Ct. at 2748.

In accord with that paradigm, Ms. Bass presented a prima facie case. The employer presented its "legitimate non-discriminatory reason" as being that Ms. Bass was a poor performer. Because the court of appeals expressly found that the employer never informed her of the poor performance prior to her removal and in fact told her that her performance was satisfactory, the jury was entitled to infer that the employer's "reason" was false. *Reeves v. Sanderson Plumbing Prod.*, 530 U.S. 133,148, 120 S.Ct. 2106, 2109 (2000). The drawing of inferences is the province of the jury. *Hunt v. Cromartie,* 526 U.S 541,553, 119 S.Ct. 1545,1552 (1999). Yet, the jury was not permitted to perform its role.

At this point the court of appeals abandoned the *McDonnell Douglas* schematic and held that Ms. Bass did not meet her burden of showing pretext. By doing so, the court of appeals necessarily decided the ultimate question of whether the employer's reason was legitimate non-discrimination. This is true because the court of appeals itself found that the employer's poor performance reason was false, because it found that the employer told Ms. Bass that her performance was satisfactory. It cannot be both ways. The court of appeals cannot find that the employer informed Ms. Bass that she was performing satisfactorily and find that the employer's poor performance reason was legitimate. Thus, the employer never met its burden to articulate a non-discriminatory reason. As a

logical consequence, the burden never shifted back to Ms. Bass to show pretext because the employer never met its burden to establish a non-discriminatory reason.

II. Ms. Bass Presented Sufficient Evidence to Reach a Jury on Her Retaliation Claim

Eighteen days after Ms. Bass wrote a letter to management complaining of a hostile environment, the employer lowered her salary target. J.A. 444,452. Twelve days after that, the employer had a mental health professional, who never examined her and whose treatment was never sought by her, give training programs on her mental instability to groups of people. J.A. 434-435. He informed various employees and managers that he diagnosed her as being "resistant to change", as having a "lot of frustration", and recommended that she see a black male or a white female psychiatrist. J.A. 435. The employer never paid for a required training course, despite Ms. Bass' repeated inquiries. J.A. 222. Regina Charles of human resources admitted that the employer did not want to pay for the course because Ms. Bass had filed an EEOC charge. J.A. 215,222.

Within a month of the filing of Ms. Bass' EEOC charge, the employer fired her. J.A. 24,26. At the time of her firing, Ms. Bass directed or participated in more than 53 meetings and completed more than 18 projects. J.A. 308-356. The employer disregarded its own disciplinary procedures, by not taking any corrective action and not making a written corrective report prior to firing her. J.A. 317. Moreover, the employer attempted to conceal her firing by listing her as optionally retired on an official termination sheet. J.A. 418.

In its de novo review of the district court's grant of

summary judgment to the employer, the court of appeals effectively chose to disbelieve Ms. Bass' evidence and construed all inferences against her. The court of appeals made a credibility determination against Ms. Bass regarding her evidence that the employer ordered her to resume her TSCA duties and sign off on the safety of hazardous chemicals, while prohibiting her from having contact with the research and development chemists, prohibiting her from visiting the lab, and prohibiting her from having access to the TSCA information. The issue of whether Ms. Bass did not have access to the TSCA information necessary to complete Benger's research and development Material Safety Data Sheets involved a factual inquiry into the TSCA requirements and the procedures, operations, and mechanisms, and of the employer's internal compliance program, which is the function of a jury, not a judge. A court may not weigh the evidence or make credibility assessments at summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,248 106 S.Ct. 2505,2510 (1986).

Clearly, Ms. Bass presented evidence that at the time of her firing she was performing her job satisfactorily. On summary judgment all inferences are to be construed in favor of the nonmoving party. *Hunt v. Cromartie*, 526 U.S at 741, 119 S.Ct. 1545, 1551-52. An inference that Ms. Bass was performing her job satisfactorily should have been construed in her favor because she completed numerous projects and directed numerous meetings. It is illogical to state that she was not doing her job because she did not return to an office, which had absolutely nothing to do with the carrying out of her duties. That office was not a necessary tool for her professional duties because she was performing them from another location: unlike a brakeman's job on a car manufacturer's assembly line; the brakeman must be in a particular location at a particular time in

order to put the brakes on the car. Under 42 U.S.C. §2000e-12, an employer can only escape liability, if it pleads and proves that its actions were in reliance on an EEOC written opinion. The court of appeals determined as a matter of fact the EEOC told the employer that it could force Ms. Bass to return to the office, even though the required pleading was not made, the required proof was not offered, and the required written opinion was not produced.

Furthermore, the fact that the employer listed Ms. Bass as optionally retired on an official termination sheet is susceptible to two inferences: one of the employer's benevolence and the other of the employer's cover up because no one would ever know or be able to find out that Ms. Bass was fired. Not only did the court of appeals construe the inference of this fact against Ms. Bass, it went further and determined as a matter of law and fact that the employer listed her as optionally retired because it extended the firing date for two weeks in order to permit Ms. Bass to qualify for a pension. App. 4-5. Because she only worked for the employer for fifteen years, Ms. Bass only qualified for a severely reduced pension of approximately $ 400 per month, which she could not access for another fifteen years. The jury could have reasonably found that because Ms. Bass received virtually no benefit and the employer received all the benefit by not having to disclose the firing in discovery and by masking the firing with a low cost measure to create a thin veil of pretext. The jury was not allowed to perform its function because the court appeals drew the inferences and decided the facts for them. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,587, 106 S.Ct. 1348,1356 (1986) citing *United States v. Diebold*, 369 U.S. 654, 82 S.Ct. 993 (1962).

The temporal proximity of the firing within thirty days of the filing of Ms. Bass' EEOC charge established a causal connection. *Spriggs v. Diamond Auto Glass*, 242 F.3d 179,190 (4th Cir. 2001); *Carter v. Ball*, 33 F.3d 450,460 (4th Cir. 1994). To defeat summary judgment, all that is required is that there be sufficient evidence supporting the claimed factual dispute, which requires the jury to resolve the parties' differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248, 106 S.Ct. at 2510. Given the surrounding evidence that the pension was paltry, that the office that Ms. Bass did not return to was irrelevant to her job, that she was fired so close in time to the filing of her EEOC charge, and that she completed all of her duties, there was sufficient evidence for a jury to conclude that her firing was retaliatory.

Under the standards of *Bass v. Dupont*, a discrimination victim must somehow the reach the jury when the employer's version of the facts is taken as true and all inferences will be construed against her. No one will ever reach the jury under this standard. The broadcast of *Bass v. Dupont* operates a red light to all discrimination victims. Title VII and the ADEA have become nothing more than meaningless words on paper.

III. Ms. Bass' Title VII Wage Discrimination Claim and Equal Pay Act Claim were Jury Questions as a Matter of Law

An employee may bring a wage discrimination claim under both the Equal Pay Act, 29 U.S.C. §206(d)(1), and Title VII, 42 U.S.C. §2000e-2(A). Under the Equal Pay Act, an employee is required to show that her employer paid different wages to employees of opposite sex for equal work in jobs which require equal skill, effort, and responsibility and which are performed under similar working conditions. *Corning*

Glass Works v. Brennan, 417 U.S. 188,195 94 S.Ct. 2223,2228 (1974); *Brinkley-Obu v. Hughes Training Inc.*, 36 F.3d 336,343 (4th Cir. 1994). Under Title VII, an employee establishes a prima facie case, when she shows that she is a member of a protected class and that the job she held was similar to higher paying jobs held by men or members outside the protected class. *Brinkley-Obu,* 36 F.3d at 343. An employee may compare herself to her successor or her predecessor. *Id.* The equal work standard does not require the jobs to be identical, only substantially equal. *Id.* Whether the jobs to be compared require equal skill, effort, and responsibility and are performed under similar working conditions is a factual determination. *Id.* at 351.

Ms. Bass' position as the Global Lycra SBU TSCA Coordinator was identical to that of the other SBU TSCA Coordinators, her comparators. The employer thought so and acted so. It is undisputed that the employer previously compared the comparators at issue including Ms. Bass for salary purposes J.A. 546,576. Since the employer has established the similarity of the jobs because it compared the comparators for salary purposes, it cannot then in the same breath take the opposite position that the jobs are dissimilar. The court of appeals' affirmance of summary judgment against Ms. Bass cannot stand because it allowed the employer to have it both ways: the comparators are comparable for salary purposes but not so when its disadvantageous to the employer.

Crucially, the employer states that the only evidence of the comparator's job duties comes down to their affidavits and Ms. Bass' affidavit and testimony. Appellee Brf. Ct. App. 44[10].

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[10] Appellee's Brief in the U.S. Court of Appeals for the Fourth Circuit.

The only way to determine the winner of such a contest is to believe one over the other. At the summary judgment stage, a judge may not weigh the evidence and determine the truth of the matter. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 249 106 S.Ct. at 2511. Thus, as matter of law Ms. Bass's wage discrimination and Equal Pay Act claims were jury questions.

For the same reason, the employer's position that it does not have job descriptions for any of its employees J.A. 570, was an issue of credibility for the jury to determine. The court of appeals acceptance as truth that the employer had no job descriptions was erroneous not only because it invaded the province of the jury but also because it created an impregnable defense for all employers. It works like this: An employee files an Equal Pay Act claim; the employer responds that it does not have any job descriptions and refuses to produce any; The employee presents evidence from her worklogs, internal memos, and correspondence that the jobs are substantially similar; The district court grants summary judgment to the employer; and The court of appeals affirms. In order to affirm the grant of summary judgment, the court of appeals necessarily had to believe the employer and disbelieve the employee. The employee was entitled to an inference from the employer's refusal to produce job descriptions that it was trying to conceal evidence favorable to her. Now the employer has at its fingertips an instantly manufacturable defense to every wage discrimination or Equal Pay Act claim filed against it.

This is what happened to Ms Bass. She presented a wealth of evidence showing that the jobs of the comparators were substantially similar, which is not limited to the following:

1. The employer recognized the SBU TSCA Coordinators as a unit J.A. 545.

2. The comparators drafted letters to the U.S. Environmental Protection Agency as a unit J.A. 131.

3. Every comparator including Ms. Bass was responsible for several locations domestic and international J.A 545,575.

4. The comparators names are all listed on the same TSCA documents J.A. 565-566.

5. The comparators all applied the same 29 sections of the same TSCA law, 15 U.S.C. §2601 et seq.

6. The comparators administered and maintained the same confidential database J.A. 163.

7. The comparators all reviewed the same 24 chemicals in a China export project J.A. 294.

8. The comparators worked across SBU's and exchanged work – Ms. Bass did TSCA work for Nylon, another SBU J.A. 550, several of them worked on a Lycra 902(c) chemical issue J.A. 553, and Ms. Bass and another comparator worked together on the Mexican inventory issue J.A. 132.

9. Ms. Bass' predecessor was Ben Melnyczuk. J.A. 547. He is listed on a TSCA memo distribution regarding a previous SBU TSCA Coordinators meeting on TSCA issues at the Victoria, Texas site. J.A. 543. Clearly, he was on the list because he functioned as the SBU TSCA Coordinator.

The court of appeals acceptance of the district court's determination that Ben Melnyczuk was not Ms. Bass' predecessor because he was a plant manager at the time of the litigation is fatally flawed. The comparison is between the job Ben Melnyczuk held in 1991 and the job Ms. Bass took over from him in 1991, not the district court's comparison of the job he held in 2001 and the job she held in 1991. The court of appeals simply disbelieved her evidence, when only the jury can make credibility determinations, *Id.*

CONCLUSION

THEREFORE, Petitioner respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit.

APPENDIX

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PORTIA BASS,

Plaintiff-Appellant,

v.

E. I. DUPONT DE NEMOURS & COMPANY,

Defendant-Appellee.

No. 02-1129, No. 02-1456, No. 02-1989

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

324 F.3d 761; 2003 U.S. App. LEXIS 5788;
91 Fair Empl. Prac. Cas. (BNA) 881

February 24, 2003, Argued
March 26, 2003, Decided

PRIOR HISTORY:
[**1] Appeals from the United States District Court for the Western District of Virginia, at Harrisonburg. Jackson L. Kiser, Senior District Judge. (CA-00-64-5).

Bass v. E. I. DuPont de Nemours & Co., 28 Fed. Appx. 201, 2002 U.S. App. LEXIS 474 (2002)

DISPOSITION:
Affirmed in part and vacated in part.

COUNSEL:
ARGUED: Tamika Chelsea Harris, Waynesboro, Virginia, for Appellant.

James Moss Johnson, Jr., MCGUIREWOODS, L.L.P., Charlottesville, Virginia, for Appellee.

ON BRIEF: R. Craig Wood, MCGUIREWOODS, L.L.P., Charlottesville, Virginia, for Appellee.

JUDGES:
Before WILKINS, Chief Judge, and LUTTIG and GREGORY, Circuit Judges. Judge Luttig wrote the opinion, in which Chief Judge Wilkins and Judge Gregory joined.

OPINIONBY:
LUTTIG

OPINION:

[*763] LUTTIG, Circuit Judge:

For several years, Portia Bass was an employee of E. I. DuPont de Nemours & Company ("DuPont"). Trouble began when DuPont decided to reassign Bass, changing her duties. From that point on, the relationship between employer and employee deteriorated until DuPont finally decided to terminate Bass. Before her termination, Bass filed a complaint with the Equal Employment Opportunity Commission ("EEOC"). After her termination, she brought suit in federal district court alleging numerous claims of discrimination and even claims of a conspiracy between the EEOC and DuPont. The district [**2] court dismissed several of Bass' claims pursuant to Federal Rule of Civil Procedure 12(b)(6). Bass' remaining claims were dismissed at summary judgment. The district court also awarded costs and attorneys' fees to DuPont as the prevailing party, and issued Rule 11 sanctions against Bass' attorney. Bass appeals all these rulings by the district court. We conclude that

the district court properly dismissed Bass' claims, and that its award of costs and attorneys' fees was appropriate. Those rulings we affirm. The district court failed to comply with Rule 11 when it issued sanctions, however, and we accordingly vacate that ruling.

I.

Because this appeal arises out of the grant of dismissal and summary judgment below, we view the facts in the light most favorable to Bass, the complainant and nonmoving party. The essential facts of the case, as well related by the district, are these. Bass is a black woman who is over forty. She worked for DuPont's Lycra division at the company's Waynesboro site for approximately fifteen years. In 1992, she became Coordinator for Material Safety Data Sheets and for Toxic Substances Control Act ("TSCA") and Chemical Hygiene.

On July 1, 1998, Bass' duties [**3] were changed. Bass became Coordinator of Chemical Safety, and her TSCA-related duties were assigned to Nancy Deputy, a white woman less than 40 years of age. In a letter dated July 27, 1998, Bass complained to DuPont management that she had not been given any reason for the change in her duties. In response, Lycra human resources manager Susan Kapalka conducted an investigation. Kapalka concluded that Bass was properly reassigned because of her "inability to complete TSCA work at the required pace" and because "her breadth of business judgment does not meet the TSCA job requirements." J.A. 403. Kapalka acknowledged that Bass was not informed of these reasons by her supervisors when she was reassigned. Prior to being reassigned, Bass had been consistently promoted, given increasing responsibilities, and told that her performance was satisfactory. Bass received no reduction in pay as a result of the change in her duties.

Several months after her reassignment, Bass' supervisors

asked her to resume duties for DuPont's Benger Laboratory site that required access to TSCA information. Because Bass was no longer a TSCA coordinator, and therefore believed she was not permitted to access TSCA [**4] information, she refused to resume those duties. In a letter dated March 4, 1999, Bass complained to management that the work environment had become hostile. In response, Kapalka put together a diverse investigative team made up of five people, including herself. The team spoke with Bass and discussed her complaints. Bass reiterated her complaints about a hostile work environment, but did not allege that the environment was hostile due to her gender, race, or age. The investigative [*764] team also spoke with Bass' co-workers and supervisors. On April 4, 1999, the team issued a formal report, in which it concluded that Bass had been reassigned because of an expanding number of duties that fell within her job description, and her inability to perform all of those duties satisfactorily. In addition, the team concluded that Bass had sufficient access to TSCA information to perform her duties for Benger Laboratory, but was unwilling to change her view of how the work should be performed in light of her changed duties. The team recommended that Bass be assigned new duties.

During the investigation, Bass had been permitted to work in an office away from her co-workers and supervisors. After the [**5] team issued its report, Bass was instructed to return to her office to assume her new duties. She refused, again citing a hostile work environment. On May 10, 1999, Bass filed a charge with the EEOC. Her supervisors again demanded that she return to her office and assume her duties. Bass insisted that she did not have to do so during the pendency of the EEOC investigation. Her supervisors then called the EEOC, which confirmed that they could require Bass to assume her duties.

In early June, 1999, Bass continued to refuse to assume her

duties or return to her office. After warnings, her supervisors escorted Bass from the Waynesboro site. Bass' termination was approved on June 16, 1999, but the termination date was moved forward to June 30, 1999, giving Bass just enough years of employment with DuPont to qualify her for pension benefits.

On August 7, 2000, Bass brought suit against DuPont. She alleged that DuPont was liable for violations of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, *et seq.*; the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.*; and the Equal Pay Act, 29 U.S.C. § 206 [**6] (d). Bass also claimed that the EEOC and DuPont had conspired to hinder the investigation of her EEOC complaint in violation of 42 U.S.C. § 1985(3), *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971), and state conspiracy law.

DuPont moved to dismiss several of the counts in Bass' complaint pursuant to Rule 12(b)(6). The district court granted that motion with respect to Bass' hostile work environment, *Bivens*, and federal and state law conspiracy claims. Later, the district court granted summary judgment to DuPont on Bass' remaining Title VII, ADEA, and Equal Pay Act claims. Finally, the district court awarded costs and attorneys' fees to DuPont, and issued Rule 11 sanctions against Bass' attorney. Bass appeals all of these rulings.

II.

We consider first Bass' contention that the district court improperly dismissed several of her claims. In reviewing the dismissal of claims pursuant to Rule 12(b)(6), we take the factual allegations in the complaint as true and review any legal issues *de novo*. *See Iodice* v. *United States*, 289 F.3d 270, 273 (4th Cir. 2002). [**7]

On appeal, Bass argues that she was not required to plead

facts in support of her hostile work environment claim. The Supreme Court has recently admonished that the requirements of notice pleading are not onerous. *See Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 152 L. Ed. 2d 1, 122 S. Ct. 992 (2002). In *Swierkiewicz* v. *Sorema*, the Court held that a complaint in an employment discrimination lawsuit need not allege specific facts establishing a prima facie case of discrimination. *Id.* at 510-11. In other words, a plaintiff is not charged with "forecasting evidence sufficient to prove an [*765] element" of her claim. *Iodice*, 289 F.3d at 281 (emphasis omitted). Our circuit has not, however, interpreted *Swierkiewicz* as removing the burden of a plaintiff to allege facts sufficient to state all the elements of her claim. *See Dickson* v. *Microsoft Corp.*, 309 F.3d 193, 213 (4th Cir. 2002) ("The Supreme Court's holding in *Swierkiewicz v. Sorema* did not alter the basic pleading requirement that a plaintiff set forth facts sufficient to allege each element of his claim." (internal citation omitted)); *Iodice*, 289 F.3d at 281. [**8] These cases reject Bass' contention. While a plaintiff is not charged with pleading facts sufficient to prove her case, as an evidentiary matter, in her complaint, a plaintiff *is* required to allege facts that support a claim for relief. The words "hostile work environment" are not talismanic, for they are but a legal conclusion; it is the alleged facts supporting those words, construed liberally, which are the proper focus at the motion to dismiss stage.

With that understanding, we turn to Bass' complaint to determine whether she has alleged facts sufficient to state the elements of her claims of hostile work environment based on gender, race, and age. Bass' complaint is full of problems she experienced with her coworkers and supervisors. These facts, however, do not seem to have anything to do with gender, race, or age harassment. In fact, Bass' only allegations in support of her claim that deal with gender, race, or sex are as follows: She

states that "plaintiff an African American female was consistently paid less than and consistently did not advance as fast as similarly situated white men." J.A. 25. In the claims section of her complaint, Bass asserts that DuPont engaged [**9] in the various acts of which she complains "because of her race and sex," J.A. 29, and later, "age," *id.*

To state a hostile work environment claim, Bass must allege that: (1) she experienced unwelcome harassment; (2) the harassment was based on her gender, race, or age; (3) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere; and (4) there is some basis for imposing liability on the employer. *See Causey* v. *Balog*, 162 F.3d 795, 801 (4th Cir. 1998). We think that Bass has failed to allege facts sufficient to support at least the second and third elements of her hostile work environment claim. Even viewed in the light most favorable to Bass, the facts she alleges merely tell a story of a workplace dispute regarding her reassignment and some perhaps callous behavior by her superiors. They do not describe the type of severe or pervasive gender, race, or age based activity necessary to state a hostile work environment claim. Bass was required to plead facts in support of her claim, and she had failed in that regard.

Bass' federal and state law conspiracy claims also fail to meet even the low [**10] burden placed on a plaintiff at the pleading stage. As noted above, Bass alleges that the EEOC and DuPont conspired against her to impede the progress of her EEOC investigation. Bass asserts, *inter alia*, that DuPont refused to tell her with whom it spoke at the EEOC, that DuPont filed a late response to her complaint, and that the EEOC's records are devoid of information relating to her investigation. Bass claims that the conspiracy violated section 1985(3), *Bivens*, and state conspiracy law.

These claims were all properly dismissed. Bass' section 1985(3) claim fails because none of her allegations make out an injury to any right she possessed. Bass' conclusory assertions of conspiracy aside, DuPont had a right to engage in the actions Bass alleged, and those actions caused her no legally cognizable injury. Bass' *Bivens* claim fails for the additional [*766] reason that she has not alleged any facts that would support a finding that DuPont was acting as an agent of the United States. As for Bass' state law conspiracy claims, they also fail because Bass has done no more than assert that the EEOC and DuPont conspired together; the facts that she has alleged do not give rise to a [**11] reasonable inference of conspiracy nor do they describe an injury to one of her legally protected interests. Accordingly, the district court's grant of Rule 12(b)(6) dismissal was proper.

III.

Bass also appeals the district court's grant of summary judgment to DuPont on her Title VII race and sex discrimination claims, her ADEA claim, and her Equal Pay Act claim. At the summary judgment stage, we view the facts in the light most favorable to the nonmoving party, which in this case is Bass. We review the district court's grant of summary judgment *de novo*. *See Dawkins* v. *Witt*, 318 F.3d 606, 610 (4th Cir. 2003).

Having thoroughly reviewed the district court's opinion and the parties' briefs and submissions on appeal, we conclude that the district court did not err in its grant of summary judgment on Bass' claims. Her claims were lacking in factual or legal support. We therefore affirm on the reasoning of the district court. n1

----------Footnotes----------

n1 We affirm the district court's reasoning with one exception. The district court stated that Bass had not adduced sufficient evidence to meet her burden of demonstrating that she was performing satisfactorily at the time of the adverse employment actions. *See* J.A. 73. This is certainly correct with respect to her termination, for she had refused to resume her duties at that point. But we think she had provided sufficient evidence of satisfactory performance at the time of her reassignment and the Kapalka letter. Up to that point, as even DuPont acknowledges, Bass had been promoted, received pay increases, and been told that her performance was satisfactory. We think that evidence enough to meet her burden with respect to her prima facie case. But, for the other reasons given by the district court, Bass' claims were properly rejected.

----------End Footnotes----------

[**12]

IV.

Finally, Bass challenges the district court's decisions awarding costs and attorneys' fees to DuPont and issuing Rule 11 sanctions against Bass' counsel. We review the district court's decision to award costs for abuse of discretion. *See Cherry* v. *Champion Intern. Corp.*, 186 F.3d 442, 446 (4th Cir. 1999). Rule 54(d)(1) creates a presumption that costs are to be awarded to the prevailing party, which in this case is DuPont. *See id.* Bass argues that the district court abused its discretion by ordering her to pay $ 3627.26 in costs because this figure represents half of her disposable income. That figure was itself roughly half of the amount requested by DuPont. The district court's decision, which thoroughly examined all the costs requested by DuPont and reduced them significantly, was not an abuse of discretion.

We likewise review the district court's award of attorneys' fees for abuse of discretion. *See DeBauche* v. *Trani*, 191 F.3d 499, 510 (4th Cir. 1999). An award of fees to the defendant is appropriate where the plaintiff's action was frivolous, unreasonable, or without foundation. *See id.* The district court concluded that [**13] DuPont was entitled to attorneys' fees for its expenses in defending against the section 1985 claim and against the wage-based Title VII claims because those claims were frivolous. DuPont asked for $ 21,937.39 in fees. Applying the lodestar approach, the district court determined that the amount requested by DuPont was reasonable, but, taking into consideration Bass' financial circumstances, the district court halved the [*767] award. As a result, the actual attorneys' fees award was for $ 10,968.69.

We cannot say that the district court abused its discretion in arriving at that figure. Bass' section 1985 conspiracy allegations were frivolous on their face, and her wage-based discrimination claims lacked any foundation in the record apart from her own conclusory assertions. It does appear that the fees will impose a substantial financial burden on Bass. In *DeBauche* v. *Trani*, this court vacated and remanded an award of attorneys' fees because the lower court had failed to consider the plaintiff's financial position and the award appeared likely to force the plaintiff into financial ruin. *Id.* at 511. Here, however, the district court did take into account Bass' financial [**14] position and drastically reduced the award. The resulting award was not an abuse of discretion.

Bass, or more accurately her attorney, also challenges the imposition of Rule 11 sanctions. The district court imposed $ 1000 in sanctions on Bass' attorney because it concluded that "the conspiracy claims put forth by Bass's attorney lacked any evidentiary support and were unlikely to have evidentiary support even after discovery." Supplemental J.A. 25-26. For the

reasons stated above, we conclude that the district court did not abuse its discretion in determining that Bass' conspiracy claims warranted sanctions. *See Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405, 110 L. Ed. 2d 359, 110 S. Ct. 2447 (1990) (applying abuse of discretion review to imposition of Rule 11 sanctions).

However, in imposing sanctions, the district court failed to comply with the procedural requirements of Rule 11. Long after the resolution of Bass' claims on the merits, Dupont made a renewed motion for sanctions relating to the conspiracy charges in Bass' complaint. The district court allowed briefing and argument on that motion. In its ruling, the district court rejected DuPont's motion [**15] for sanctions because it "was not served and filed before the conspiracy claims were disposed of." Supplemental J.A. 24. The district court then proceeded, in the same order, to issue sanctions *sua sponte*. It reasoned that the "safe harbor" provision of Rule 11, which had barred the sanctions requested by DuPont, was not applicable to it.

This action by the district court violated Rule 11(c)(1)(B), which provides that

on its own initiative, the court may enter an order describ ing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

Fed. R. Civ. P. 11(c)(1)(B). Here, the court did not issue an order describing the sanctionable conduct and subsequently allowing Bass' attorney to show cause why she had not violated Rule 11.

DuPont argues that Bass' counsel received effective notice that sanctions would be imposed through its motion for

sanctions and through an earlier suggestion by the district court that sanctions might be appropriate. While Bass' counsel did make arguments regarding the merits of sanctions in her brief responding [**16] to DuPont's renewed motion for sanctions, it appears that she relied primarily on the safe harbor provision of Rule 11. That provision of course does not apply to sanctions initiated by the district court, and thus Bass' attorney clearly was not contemplating that the court would issue sanctions. Also relevant is the fact that the district court imposed sanctions months after the resolution of Bass' claims on the merits. We have previously noted the "legal principle that a court should resolve sua sponte Rule 11 issues before resolution of the merits of the case," and stated that the failure of a district court to do so [*768] requires particularly stringent review of the court's action. *Hunter* v. *Earthgrains Co. Bakery*, 281 F.3d 144, 153 (4th Cir. 2002). Here, the fact that the district court did not comply with the procedural notice requirements of Rule 11 coupled with the late date at which sanctions were imposed convinces us that the district court's order imposing sanctions should be vacated. n2

----------Footnotes----------

n2 Bass' counsel filed a letter objecting to DuPont's submission of a document in supplement of the record. Specifically, Bass objects to a document filed by DuPont in response to a request from this court regarding the briefing in the district court of the Rule 11 sanctions motion. We construe Bass' "objection" as a motion to strike and we deny the motion as moot in light of our decision to vacate the Rule 11 sanctions.

----------End Footnotes----------

[**17]

CONCLUSION

For the reasons stated herein, we conclude that the district court's order dismissing several of Bass' claims was proper, that its grant of summary judgment was likewise correct, and that it did not abuse its discretion in awarding costs and attorneys' fees. Because it failed to comply with the procedural requirements of Rule 11, however, we vacate its order imposing sanctions.

AFFIRMED IN PART; VACATED IN PART

PORTIA BASS,

Plaintiff-Appellant,

v.

E. I. DUPONT DE NEMOURS & COMPANY,

Defendant-Appellee.

No. 02-1129, No. 02-1456, No. 02-1989

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
April 28, 2003

On Petition for Rehearing En Banc

The Appellant's petition for rehearing en banc was submitted to the Court.

As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

For the Court,
/s/ Patricia S. Connor
CLERK

Clerk's Office U.S. Dist. Court
At Harrisonburg, Va
Filed Dec 26 2001
John F. Corcoran, Clerk
By: Deputy Clerk

ENTERED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRRISONBURG DIVISION

PORTIA BASS	)	
Plaintiff,	)	Case No. 5:00CV00064
	)	
v.	)	ORDER
	)	
	)	By: Jackson L. Kiser
E.I. DUPONT DE	)	Senior United States
NEMOURS & CO.,	)	District Judge
	)	
Defendant.	)	

Before the Court is Defendant's Motion for Summary Judgment on all remaining Counts of Plaintiff's Complaint. For the reasons stated in the attached Memorandum Opinion, I GRANT Defendant's Motion in its entirety.

The Clerk is directed to send a certified copy of this Order to all counsel of record. Any pending motions are to be dismissed as moot and the clerk is directed to strike this case from the docket.

Entered this 26th day of December, 2001.

/s/ Jackson L. Kiser
Senior United States District Judge
A True Copy : Teste:
John F. Corcoran, Clerk
By: Deputy Clerk

Clerk's Office U.S. Dist. Court
At Harrisonburg, Va
Filed Dec 26 2001
John F. Corcoran, Clerk
By: Deputy Clerk

ENTERED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRRISONBURG DIVISION

PORTIA BASS	)
Plaintiff,	) Case No. 5:00CV00064
	)
v.	) MEMORANDUM OPINION
	)
	) By: Jackson L. Kiser
E.I. DUPONT DE	) Senior United States
NEMOURS & CO.,	) District Judge
	)
Defendant.	)

Remaining before this Court are plaintiffs claims alleging racial and sexual discrimination and retaliation in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e (1999) (Counts I - III), age discrimination in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C.A. § 621 *et seq*. (1999) (Count V), and wage discrimination in violation of the Equal Pay Act,29 U.S.C. § 206(d) (1999) (Count IV). The defendant moves for summary judgment on all

claims. The defendant renews its motion for summary judgment on the Equal Pay Act claim, a motion this Court previously denied based on facts alleged in an affidavit filed by the plaintiff.

The parties have fully briefed the issues involved and have presented oral argument. The motion is, therefore, ripe for disposition. For the reasons discussed herein, summary judgment is granted with respect to all of plaintiffs remaining claims.

I. FACTUAL SUMMARY

The plaintiff, Portia Bass, worked for DuPont's Lycra division at the company's Waynesboro site for approximately fifteen years. Bass is an African-American woman, and was over the age of 40 at all times relevant to this case. She holds a bachelor's degree in chemistry and a master's degree in science. Bass began her career at DuPont as a Process Control Chemist.

In 1992, she became Coordinator for Material Safety Data Sheets ("MSDS") and for Toxic Substance Control Act ("TSCA") and Chemical Hygiene. In this capacity, Bass occasionally performed work for DuPont divisions other than Lycra, and for sites other than Waynesboro. In addition, she worked with employees at other DuPont components who also had responsibilities involving TSCA compliance.

On July 1, 1998, Bass' duties were changed. Bass became Coordinator of Chemical and Safety, and her TSCA-related duties were assigned to Nancy Deputy ("Deputy"), a Caucasian woman less than 40 years of age who was trained as a biologist, but who had experience working in chemical hygiene. In a letter dated July 27, 1998, Bass complained to DuPont management that she had not been given any reason for the change in her duties. In response, Lycra human resources

manager Susan Kapalka ("Kapalka") conducted an investigation. In a letter to Lycra and Waynesboro management, Kapalka concluded that Bass was reassigned because of her "inability to complete TSCA work at the required pace" and because "[h]er breadth of business judgment does not meet the TSCA job requirements." Kapalka acknowledged that Bass was not told by her supervisors that she was being reassigned because of her performance. Although Bass concedes that before her reassignment, her duties comprised more than a full-time job, her supervisors never indicated that her performance was inadequate prior to her reassignment. Instead, Bass had been consistently promoted, given increasing responsibilities, and told that her performance was satisfactory.

Bass received no reduction in pay as a result of the change in her duties. At the next available opportunity, she received an increase in her pay. Bass also received an increase in her salary target, a number indicating the size of the pay increase that employees are eligible for at their next performance appraisal. In late 1998, Bass' salary target was increased from 105 to 107, but was reduced to 106.5 sometime in early 1999.

Several months after her reassignment, Bass alleges that her supervisors asked her to resume duties for DuPont's Benger Laboratory site that required access to TSCA information. Because Bass was no longer a TSCA coordinator, and therefore believed she was not permitted to access TSCA information, she refused to resume these duties. In a letter dated March 4, 1999, Bass complained about the matter to DuPont management. In the letter, Bass wrote that "[t]he environment has become hostile." In response, Kapalka put together a diverse investigative team made up of Regina Charles, who was an African-American human resources manager for another DuPont division, an hispanic TSCA expert from another site, an

African-American Lycra operations manager at Waynesboro, a male human resources manager at Waynesboro, and Kapalka herself. The team spent half a day with Bass discussing her complaints. During this meeting, Bass complained of a "hostile environment," but never alleged that her treatment was due to her race, age or gender. Bass also asked the team to recommend that she be transferred to another site. The team interviewed a number of DuPont personnel, including Bass' supervisors, co-workers, and other DuPont employees with TSCA-related duties. On April 4, 1999, the team issued a formal report, in which it concluded that Bass had been reassigned because of an expanding number of duties that fell within her job description, and her inability to perform all of those duties satisfactorily. In addition, the team concluded that Bass had sufficient access to TSCA information to perform her duties for Benger Laboratory, but was unwilling to change her view of how the work should be performed in light of her changed duties. The investigative team recommended that Bass be relieved of any duties with respect to Benger Laboratory and be given new responsibilities instead. The team recommended that Bass not be transferred.

During the pendency of the team's investigation, Bass had been permitted to work in an office away from her supervisors and co-workers. After the team issued its report, Bass was instructed to return to her office and to assume her new duties. She refused, again citing a "hostile work environment." On May 10, 1999, Bass filed a charge with the EEOC. Her supervisors again demanded that she return to her office and assume her duties. Bass insisted that she did not have to do so during the pendency of the EEOC investigation. Her supervisors then called the EEOC, which confirmed that they could require Bass to assume her duties. Her supervisors recommended to Bass that she also call the EEOC.

At around the same time, Bass' supervisors suggested that she attend a Dale Carnegie training course. Bass requested but never received the funding necessary to enroll in the course.

In early June, 1999, Bass continued to refuse to assume her duties or return to her office. Her supervisors told her that she might be terminated, and after one last request on June 14,1999, they escorted Bass from the Waynesboro site. On June 16, 1999, a team made up of personnel from the various DuPont components at the Waynesboro site approved Bass' termination. Bass' termination date, however, was moved forward to June 30, 1999, giving Bass just enough years of employment with DuPont to qualify for pension benefits. DuPont thereafter characterized her termination as a "retirement."

II. ANALYSIS

A. Summary Judgment Standard

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A mere scintilla of evidence in support of the plaintiff's position is not sufficient; there must be evidence on which the jury could reasonably find for the plaintiff. Thus, I must ask "whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." *Id.* at 250. In making this determination, I must view the facts and draw reasonable inferences in the light that is most favorable to the nonmoving party. *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir. 1994)

(citations omitted), *cert. denied*, 513 U.S. 813 (1994); *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1129 (4thCir. 1987).

B. Non-Wage Discrimination Claims

In Counts One through Three, the plaintiff claims she was subjected to discrimination in the terms, conditions and benefits of her employment because of her race, gender and age. Specifically, Bass alleges that DuPont substantially reduced her duties, denied her request for a transfer, issued a negative assessment of her performance, failed to promote her, [1]and terminated on the basis of her race, gender and age in violation of Title VII and the ADEA. DuPont raises a number of objections to the sufficiency of the plaintiffs evidence.

1. Prima Facie Case

Because the plaintiff has not presented direct evidence of discrimination, she must establish a *prima facie* case of discrimination as set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). If the plaintiff establishes a *prima facie* case and thus creates a presumption of discrimination, the burden shifts to the defendant to proffer a legitimate, nondiscriminatory reason for its actions. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981). If the defendant articulates such a reason, the burden shifts back to the plaintiff to demonstrate that the proffered reason is a pretext for unlawful discrimination. *ID* at 256.

[1]Bass does not allege that she sought a particular job for which she was qualified and for which she was rejected, and thus cannot make out a *prima facie* case for failure to promote. *Brown v. McLean*, 159 F.3d 898, 902 (4th Cir. 1998). Therefore, I will not address this claim any further.

The plaintiff establishes a *prima facie* case by showing that (1) she is a member of a class protected by Title VII, (2) she was performing satisfactorily, or was entitled to, or qualified for, a particular benefit, (3) she suffered an adverse employment action or was denied the benefit, and (4) those not protected by Title VII received more favorable treatment. *Williams v. Cerbonics, Inc.*, 871 F.2d 452, 455-456 (4th Cir. 1989); *Douglas v. Dabney S. Lancaster Community College*, 990 F. Supp. 447, 460 (W.D. Va. 1997). In the case before me, DuPont acknowledges that Bass, an African-American woman over the age of 40, is a member of a class protected by Title VII. In most other respects, however, DuPont contends that the plaintiff has failed to present sufficient evidence to establish a *prima facie* case of discrimination. I agree.

a. Adverse Employment Action

An employer's action will constitute an adverse employment action for purposes of Title VII only if it affects the "terms, conditions or benefits of employment." *Von Gunten v. Maryland*, 243 F.3d 858, 866 (4th Cir. 2001) ("'[E]vidence that the terms, conditions, or benefits of employment were adversely effected' is the sine qua non of an adverse employment action.'"). DuPont concedes that termination constitutes an adverse employment action. Bass contends that the following also constitute adverse employment actions: her reassignment, the denial of her request for a transfer, and the letter in which Kapalka negatively evaluates her performance ("Kapalka letter"). I address each of these below.

For purposes of Title VII claims, adverse employment actions include "significant change[s] in employment status,

such as... reassignment with significantly different responsibilities." *Burlington Indus., Inc. v. Ellerth*, 524 U.s. 742, 761 (1998); *see also Von Gunten v. Maryland*, 243 F.3d 355, 357 (4th Cir. 1985) (concluding that reductions in "responsibilities and professional status" could constitute adverse employment actions). Bass contends that relieving her of her TSCA duties prevented her from being considered for international positions within DuPont. Bass points to an e-mail message in which Kapalka tells a Waynesboro manager that Bass probably would not be considered for an international position because those positions either involved TSCA-related work, or required an international background. To the extent that her opportunities for advancement within DuPont were restricted, the change in her duties may constitute an adverse employment action, and for the purposes of this summary judgment motion I will assume that it does. But, as will be seen in the following section, her claim is deficient in other respects.

A negative performance evaluation, such as that contained in the Kapalka letter, can constitute an adverse employment action. *See Von Gunten V. Maryland*, 243 F.3d 858, 867-68 (4th Cir. 1998) (*citing Spears v. Missouri Dept. of Corr. & Human Res.*, 210 F.3d 850, 854 (8th Cir. 2000) (finding that unfavorable evaluations could constitute adverse employment actions). However, a negative performance evaluation does not constitute an adverse employment action unless it had a tangible effect on the recipient's employment. *Id.* at 868. Bass suffered no financial detriment as a result of her changed duties; indeed, she received an increase in her salary at the next available opportunity. Bass alleges that the Kapalka letter prevented her from moving within the company, but provides little evidence other than the denied request for a transfer. The team that investigated Bass' complaints recommended denying her request for a transfer because Bass "require[d] significant

personal development to be successful," and a transfer would not by itself bring about such success. Nonetheless, for the purposes of this summary judgment motion, I will assume that the negative evaluation was an adverse employment action.

Finally, Bass argues that the denial of a transfer was itself an adverse employment action. Bass simply does not present any evidence that the denial of a transfer, by itself, affected the terms conditions, and benefits of her employment. Bass points to no opportunities or benefits, either professional or financial, that she lost as a result of the denied transfer. The investigative team recommended that management deny Bass' request for a transfer in the apparent belief that Bass was more likely to succeed if she remained at Waynesboro. Thus, the terms, conditions and benefits of Bass' employment were in no way jeopardized. Consequently, I find that the denial of a transfer was not an adverse employment action.

b. Satisfactory Performance

Bass fails to present sufficient evidence that her performance was satisfactory, and thus fails to raise an inference that her termination, her reassignment, or Kapalka's negative evaluation of her performance were discriminatory. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981) (*prima facie* case gives rise to inference of discrimination). Bass concedes that she refused to assume at least some of the duties, including attending certain meetings, that she was given after management adopted the investigative team's report in April 1999. She also refused to return to the office where she was assigned to do her work, and which was located near other employees with whom she was assigned to work. Furthermore, she told her supervisors that she would not do any of these things while her EEOC charge was being

investigated. Her supervisors responded by calling the EEOC, and were told that Bass was not exempt from performing the duties of her job. They then recommended that Bass contact the EEOC herself. Despite these efforts, various memorandum and e-mail messages in the record indicate that Bass continued to refuse to assume her assigned duties. She continued to do so up until and including June14, 1999, the day her supervisors escorted her from the Waynesboro site. Bass does not attempt to counter this evidence except by asserting that she acted reasonably in refusing to return to her office and to assume her duties. Thus, Bass offers no evidence that her performance leading up to her termination was satisfactory.

Nor does Bass offer sufficient evidence that her performance was such that either her reassignment or the Kapalka letter give rise to an inference of discrimination. *See Texas Dept. of Community Affairs v. Burdine* 450 U.S. 248, 253 (1981) ("*prima facie* case serves [to] eliminate[] the most common nondiscriminatory reasons for the plaintiffs rejection") (*citing Teamsters v. United States*, 431 U.S. 324, 358, n. 44 (1977)). Prior to her reassignment, Bass received satisfactory performance reviews, and DuPont acknowledges that it did not apprize Bass of its concerns regarding her performance. Nonetheless, Bass has acknowledged that prior to her reassignment her duties constituted more than a full-time job. Moreover, although Bass did not receive a formal assessment alerting her to performance problems, she appears to have received informal assessments. Long before her reassignment, Bass indicated in her own log book that she had been told she "need[ed] help prioritizing."

2. Non-Discriminatory Reasons and Pretext

Even if Bass was able to establish a *prima facie* case of

discrimination with regard to her reassignment and the Kapalka letter, she has not presented sufficient evidence that DuPont's nondiscriminatory reasons for its actions were pretextual. As evidence of pretext, Bass points to the fact that DuPont did not mention her "inability to complete her work at the required pace" before her reassignment. It is apparent, however, that Bass knew that her job duties were more than she could handle. As noted above, Bass testified in her deposition that her duties constituted more than a full-time job. On July 19, 1996, two years before her reassignment, Bass wrote in her log book that her job "requires a staff." According to the findings of the investigative committee, Bass herself recommended that more people were needed to do her job. Bass simply does not present sufficient evidence that the non-discriminatory reasons DuPont proffers s for its actions are pretextual.

C. Retaliation

In Count V, Bass alleges that DuPont retaliated against her by terminating her, denying her training, and reducing her salary target. In order to establish a *prima facie* case of retaliation in violation of Title VII, a plaintiff must show that "1) the employee engaged in protected activity; 2) the employer took adverse employment action against the employee; and 3) a causal connection existed between the protected activity and the adverse action." *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir.1985). The employer may then rebut the *prima facie* case, *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), by showing that there was a legitimate non-discriminatory reason for the adverse action, *Ross*, 759 F.2d at 365, after which the burden shifts back to the plaintiff to show that those reasons are pretextual. *Carter v. Ball*, 33 F.3d 450, 459 (4th Cir.1994).

1. Prima Facie Case

a. Protected Activity

Bass argues that she engaged in protected activity on three occasions, when she filed her EEOC charge and when she wrote the two letters dated July 27, 1998 and March 4, 1999. It is undisputed that the filing of the EEOC charge constitutes protected activity. As for the letters, protected activity does encompass complaints or action intended "to bring attention to an employer's discriminatory activities." *Kubicko v. Odgen Logistics Servs.*, 181 F.3d 544, 551 (4th Cir. 1999). After reviewing the July 27, 1998 letter, however, I find that it could not possibly have been intended to bring discriminatory activity to the attention of DuPont management. The letter contains no suggestion that the actions Bass complains of were taken because of her age, race, or gender. Because I find that this letter does not constitute protected activity, no actions that DuPont may have taken in response to the letter could constitute retaliation in violation of Title VII. In the letter dated March 4, 1999, Bass complains generally of a "hostile environment," but makes no other plausible reference to any discriminatory activity. Moreover, when Bass was given the opportunity to discuss the complaints in the letter with the investigative team, she failed to mention any actions that DuPont took or any negative treatment she received because of her race, gender or age. Consequently, I find that the March 4, 1999 letter also does not constitute protected activity.

b. Adverse Employment Action and Causal Connection

Bass contends that her termination, the denial of funding to attend a training course, and a reduction in her salary target constitute adverse employment actions. Retaliatory acts only

constitute adverse employment actions if they adversely effect the terms, conditions or benefits of employment. *Von Gunten v. Maryland*, 243 F.3d 858, 865 (4th Cir. 2001); *Munday v. Waste Mgmt. of North America, Inc.*, 126 F.3d 239, 243 (4th Cir. 1997). As noted previously, it is undisputed that termination constitutes an adverse employment action. Bass has offered no evidence, however, that the denial of funding for a short, one-time training course affected the terms, conditions or benefits of her employment. Indeed, Bass does not contest the assertion by DuPont that its managers instructed Bass to take the course. DuPont explains the lack of funding approval as merely a clerical error. There simply is no evidence in the record that not taking the course would affect Bass' employment whatsoever. Consequently, I find that denial of the funding for the training course would not constitute an adverse employment action.

Nor can Bass establish a *prima facie* case of retaliation with respect to the reduction in her salary target. At DuPont, a salary target establishes the size of the pay increase that employees are eligible for at their next performance appraisal. Thus, any reduction in the salary target would affect the terms, conditions or benefits of employment, and would therefore constitute an adverse employment action. A performance appraisal Bass received at the end of 1998 indicates her salary target was increased from 105 to 107. A personnel record dated March 22, 1999 indicates a salary target for Bass of 106.5, although there is no evidence in the record indicating precisely when the target was lowered. However, Bass cannot show a causal connection between any protected activity and the alleged reduction in her salary target. The March 22, 1999 personnel record pre-dates her EEOC charge, which was filed on May 10, 1999. Thus, DuPont could not possibly have reduced Bass' salary target in retaliation for her EEOC charge.

2. Non-discriminatory Reasons and Pretext

As stated previously, DuPont asserts that Bass was terminated for refusing return to her office and assume her duties. Bass contends that the fact that her termination occurred within weeks of when DuPont managers learned of her EEOC charge establishes pretext. Bass also points to statements allegedly made by Regina Charles, a human resources manager at another DuPont division who was asked to sit on the team that investigated the complaints Bass made in her March 4, 1999 letter. Bass testified that Charles told her that "since [she] had filed an EEOC charge, if [she] didn't go back to the office, they were going to fire [her]."

Even viewing the evidence in the light most favorable to Bass, she has not presented evidence sufficient to counter the evidence that DuPont terminated her for insubordination. Bass herself acknowledges that, over a period exceeding two months, she repeatedly refused to follow direct instructions from her supervisors to return to her office and assume her assigned duties. Even after she was advised that management had consulted with the EEOC, and was advised to do so herself, she still refused to assume her duties. Her supervisors warned that she could be terminated, but she persisted. Furthermore, Regina Charles had no role in the decision to terminate Bass. Charles was a human resources manager in another DuPont division whose only role in the matter was as an independent voice on the investigative committee. Thus, assuming *arguendo*, that she made the statement, it is of little value in establishing discriminatory intent on the part of those who were involved in the decision to terminate Bass. Consequently, I conclude that no reasonable jury could find that Bass was fired for any reason other than her own insubordination.

D. Wage Discrimination

In her last remaining claim, the plaintiff alleges that she was paid less than other similarly situated employees because of her race, gender and age in violation of Title VII and the Equal Pay Act (EPA). An employee that brings a claim under the EPA must first establish a *prima facie* case of wage discrimination by proving: (1) that the employer has paid different wages to employees of the opposite sex; (2) that said employees hold jobs that require equal skill, effort, and responsibility; and (3) that such jobs are performed under similar working conditions. *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 613 (4th Cir. 1999). Once the employee has established a *prima facie* case under the EPA, the employer bears the burden of proving by a preponderance of the evidence that a wage difference between male and female employees was the result of a seniority system, merit system, or system which measures earnings by quantity or quality of production, or was based on any factor other than sex. 29 U.S.C. § 206(d)(1) (1999); *see also Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 614 (4th cir. 1999); *Strag v. Craven Commun. College*, 55 F.3d 943, 948 (4th Cir.1995). A plaintiff may establish a case for wage discrimination under Title VII by making out a *prima facie* case under the EPA and then discrediting her employer's proffered explanations for the pay differential. *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 353 (4th Cir. 1994). In this case, the plaintiff alleges wage discrimination under Title VII on the basis of sex, age and race, and thus must make out a *prima facie* case with respect to each of those classifications. Bass has identified thirteen DuPont employees as comparators for purposes of both her EPA and Title VII claims.

Of the comparators identified by Bass, only one is a valid comparator for purposes of her EPA claim. The EPA prohibits

discrimination in compensation on the basis of gender "within any establishment." 29 U.S.C. § 206(d)(1) (1999). The EPA's implementing regulations state that "establishment" refers to "a distinct physical place of business rather than to an entire business or 'enterprise' which may include several separate places of business. Accordingly, each physically separate place of business is ordinarily considered a separate business." 29 C.F.R. § 1620.9(a). An exception to the implementing regulations provides that "unusual circumstances may call for two or more distinct physical portions of a business enterprise being treated as a single establishment." 29 C.F.R. § 1620.9(b). Unusual circumstances include companies in which "a central administrative unit may hire all employees, set wages, and assign the location of employment; employees may frequently interchange work locations; and daily duties may be *virtually identical* and performed under similar working conditions." 29 C.F.R. §1620.9(b) (emphasis added). I previously denied DuPont's motion for summary judgment on the plaintiff's EPA claim based on an affidavit in which Bass asserted that a central administrative unit hired, set wages, and assigned locations for both her and her comparators, that the daily duties and working conditions for plaintiff and her comparators were "virtually identical," and that she and her comparators interchanged work locations. Since then, DuPont has presented deposition testimony, numerous affidavits and other evidence to counter these assertions, and Bass has produced no evidence to support them. Even when viewed in the light most favorable to her, 'Bass has not presented sufficient evidence to show that unusual circumstances exist with respect to DuPont. Thus, only those proposed comparators who work at the Waynesboro site can be considered for purposes of the plaintiff's EPA claim.

The only comparator who works at the Waynesboro site, Bohdan Melnychuk, is male and earned a higher salary than

Bass. However, Bass has adduced no evidence that Melnychuk held a job requiring skill, effort, and responsibility equal to hers. Indeed, DuPont asserts that as "Site Leader," his job required considerably greater skill, effort and responsibility than did the job that Bass held. Consequently, Bass fails to make out a *prima facie* case with respect to her EPA claim.

As noted above, Bass has identified thirteen comparators, all of whom earned a higher salary than Bass, and were of a different race or sex than Bass and/or were under the age of forty. However, Bass has not adduced sufficient evidence that these comparators held jobs that required skill, effort, and responsibility equal to hers and were performed under working conditions similar to hers to support a *prima facie* showing that the wage differential violated Title VII. Bass has adduced evidence that many of the comparators she identifies had at least some TSCA-related duties. Beyond that, there is no evidence in the record indicating what the comparators Bass identifies do in their jobs. Based on this evidence, no reasonable jury could conclude that DuPont paid higher salaries to employees who were younger, or of a different sex or race than Bass even though they performed jobs requiring equal skill, effort, and responsibility. Even if Bass had made out a *prima facie* case, DuPont has presented a substantial amount of evidence indicating that the proposed comparators had substantially different jobs requiring greater responsibility than the job Bass held. In addition, many of the comparators had significantly more relevant education and experience than Bass. Bass has adduced no evidence that any of these proffered explanations for the wage differentials are pretextual.

III. CONCLUSION

In summary, for the reasons stated above, I will grant

Defendants' Motion for Summary Judgment as to all of Plaintiffs remaining claims. The clerk is directed to send a copy of this Memorandum Opinion to all counsel of record. An appropriate Order shall this day issue. Entered this 26th day of December, 2001.

/s/ Jackson L. Kiser
Senior United States District Judge

A True Copy : Teste:
John F. Corcoran, Clerk
By: Deputy Clerk

Clerk's Office U.S. Dist. Court
At Harrisonburg, Va
Filed Mar 25 2002
John F. Corcoran, Clerk
By: Deputy Clerk

ENTERED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRRISONBURG DIVISION

PORTIA BASS	)	
Plaintiff,	)	Case No. 5:00CV00064
	)	
v.	)	ORDER
	)	
	)	By: Jackson L. Kiser
E.I. DUPONT DE	)	Senior United States
NEMOURS & CO.,	)	District Judge
	)	
Defendant.	)	

Before the Court is the Bill of Costs by the Defendant, E I. DuPont de Nemours & Co. ("DuPont"). The matter has been fully briefed by the parties and oral argument was heard on March 18, 2002. The motions are therefore ripe for decision. For the reasons discussed in the accompanying Memorandum Opinion, defendant DuPont's petition for costs is GRANTED as modified by this Order. Pursuant to Federal Rule of Civil Procedure 54 and 28 U.S.C. § 1920, DujPont is awarded costs in the amount of $3,627.26.

The Clerk is directed to send a certified copy of this Order

to all counsel of record.

Entered this 25th day of March, 2002.

/s/ Jackson L. Kiser
Senior United States District Judge

A True Copy : Teste:
John F. Corcoran, Clerk
By: Deputy Clerk

Clerk's Office U.S. Dist. Court
At Harrisonburg, Va
Filed Mar 25 2002
John F. Corcoran, Clerk
By: Deputy Clerk

ENTERED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRRISONBURG DIVISION

PORTIA BASS	)
Plaintiff,	) Case No. 5:00CV00064
	)
v.	) MEMORANDUM OPINION
	)
	) By: Jackson L. Kiser
E.I. DUPONT DE	) Senior United States
NEMOURS & CO.,	) District Judge
	)
Defendant.	)

I. Defendant's Bill of Costs

Before the court is the Bill of Costs filed by the Defendant, E.I. DuPont de Nemours & Co. ("DuPont"). DuPont was the prevailing party in this case, in which the court awarded Summary Judgment on December 26,2001. As such, DuPont is entitled to costs pursuant to 28 U.S .C. § 1920 (1999). In its Bill of Costs, DuPont seeks a total of $7,180.78. This amount includes $3,363.03 for transcripts and $3,363.78 for copies. A

prevailing party is only entitled to such costs if they were necessarily obtained for use in the case." 28 U.S.C. § 1920(2),(4). Because I find that not all the costs sought by DuPont were necessarily incurred, the Bill of Costs is adjusted as discussed herein. The award of costs is within the sound discretion of the court. *Principe v. McDonald's Corp.*, 95 F.R.D. 34,36 (E.D. Va. 1982); *Advance Business Systems & Supply Co. v. SCM-Corp.*, 287 F.Supp.143,162 (D. Md.1968). In the exercise of this discretion, I have also considered the limited financial resources of the Plaintiff in adjusting the amount sought in the Bill of Costs. *See McGill v. Faulkner*, 18 F.3d 456, 459 (7th Cir. 1994) (considering losing party's financial resources in assessing costs); *Cross v. General Motors, Corp.*, 721 F.2d 1152, 1157 (8th Cir. 1983) (same);*Badillo v. Central Steel & Wire Co.*, 717 F.2d 1160, 1165 (7th Cir. 1983) (same); *National Organization for Women v. Bank of California*, 680 F.2d 1291, 1294 (9th Cir. 1982) (same).

A. Deposition Transcripts

First, the Bill of Costs includes the cost of obtaining a transcript of the Plaintiff's deposition, for which DuPont seeks $3,391.50. A prevailing party is entitled to reimbursement for all costs incident to depositions that are "reasonably necessary" in preparation for the litigation. *Cofield v. Crumpler,* 179 F.R.D. 510, 518 (E.D. Va. 1998). This includes the cost of the court reporter's attendance, the cost of the original transcript of the deposition and one copy. *Id.* Thus, DuPont is entitled to $1,105.50 for the transcript and one copy, and $275.00 for the appearance fee for the court reporter. Because the deposition was recorded stenographically, it was not necessary to also videotape the deposition. Consequently, I will disallow all costs associated with videotaping the deposition. The court further denies the cost of shipping the transcripts and/or copies.

Shipping is not recoverable under Section 1920. *Scallet v. Rosenblum*, 176 F.R.D. 522, 529 (W.D. Va. 1997). Similarly, the court will disallow the cost of including exhibits in the deposition transcripts as these are primarily for the convenience of counsel, who often has a copy of the exhibit at hand already. *Id.* Finally, I will allow DuPont to recover the $200.00 appearance fee that DuPont incurred because Plaintiff failed to attend the deposition on the date that it was originally scheduled. The parties agreed to reschedule the deposition after a notice of deposition for an earlier date already had been issued. Although DuPont failed to issue a new notice of deposition, the Plaintiff's agreement to the new date was sufficient to give her notice of the deposition. Because her failure to attend was unjustified, Plaintiff must reimburse DuPont for the appearance fee. As stated previously, the videographer's appearance fee for the missed deposition was an unnecessary expense and cannot be reimbursed. Thus, DuPont is entitled to recover a total of $1580.50 for costs associated with the deposition transcript.

B. Hearing Transcripts

The Bill of Costs includes costs totaling $426.25 for transcripts of four hearings. The basic standard to be applied in determining whether to allow the expense of a hearing transcript as a taxable cost is whether it was necessarily obtained for use in the case, that is, whether it was necessary to counsel's effective performance and proper handling of the case. *Marcoin, Inc. v. Edwin K Williams & Co.*, 88 F.R.D. 588, 590 (E.D. Va. 1980). The prevailing party is presumed to be entitled to recover such costs, and the burden is on the losing party to show the impropriety of an allowance. *Cofield v. Crumpler*, 179 F.R.D. 510, 514 (E.D. Va. 1998); *Principe v. McDonald's Corp.*, 95 F.R.D. 34, 35 (E.D.Va.1982). Two of

the transcripts for which DuPont seeks reimbursement were of hearings before the Magistrate on Plaintiff's motion to compel. According to DuPont, the transcripts were obtained in preparation for a hearing before this court on Plaintiff's appeal of the Magistrate's denial of her motion. DuPont requested expedited copies of both of these transcripts. The other two transcripts were of hearings before this court on two motions to dismiss by DuPont. According to DuPont, these transcripts were obtained in preparation for Plaintiff's appeal to the Fourth Circuit from this court's grant of DuPont's motions to dismiss. Plaintiff contends that the cost of the transcripts must be disallowed because the transcripts were not obtained in time to aid in the preparation of DuPont's briefs in Plaintiff's various appeals. It appears that the transcripts were not obtained before the briefs were due in Plaintiff's appeals. However, it may well be that DuPont obtained the transcripts in preparation for oral argument on the appeals. Indeed, at oral argument before this court DuPont was specifically questioned by the court about the basis for the Magistrate's ruling. Thus, Plaintiff has failed to show the impropriety of allowing DuPont to recover the costs of the transcripts, costs to which DuPont is otherwise entitled under Section 1920. I find therefore that DuPont is entitled to the cost of the transcripts. However, I find that an expedited transcript was necessary with respect to only one of the hearings on Plaintiffs motion to compel. While one of the hearings fell within days of the hearing in the appeal before this court, the other hearing was more than a month earlier. I will therefore reduce the per-page cost for which DuPont is entitled to reimbursement from $4.00 to $3.00, for a total of $183.00 for the earlier transcript. Thus, DuPont is entitled to recover a total of $365.25 for the hearing transcripts.

C. Photocopies

Finally, the Bill of Costs includes $3,363.03 for copies. Photocopying charges are taxable only to the extent that the copies were actually used as court exhibits or were furnished to the court or to opposing counsel. *Board of Directors, Water's Edge v. Anden Group*, 135 F.R.D.129, 138 (E.D.Va.199 1); *Sun Publishing Co., Inc. 'v. Mecklenburg News, Inc.*, 594 F.Supp. 1512, 1524 (E.D.Va.1984); *In re D & B Countryside, L.L.C.*., 217 B.R. 72, 80 (Bankr. E.D.Va. 1998). DuPont has offered only a sparse description of the purposes for which these copies were made. Thus, it is difficult to tell which ones were used as exhibits or furnished to the court or opposing counsel, and which ones were not. Furthermore, the court is somewhat hard pressed to find that this volume of copying was necessarily obtained for use in the case." The court therefore will allow one-half of the costs requested for copies, or $1,681.51. *See O'Bryhim v. Reliance Standard Life Ins. Co.*, 99 F.Supp. 728,737 (E.D. Va. 1998) (reducing requested copying costs by half where prevailing party did not adequately describe purpose of copies).

II. Conclusion

For the reasons discussed herein, pursuant to Federal Rule of Civil Procedure 54 and 28 U.S.C. § 1920, I award costs to DuPont in the amount of $3,627.26.

/s/ Jackson L. Kiser
Senior United States District Judge

A True Copy : Teste:
John F. Corcoran, Clerk
By: Deputy Clerk

Clerk's Office U.S. Dist. Court
At Harrisonburg, Va
Filed Jul 25 2002
John F. Corcoran, Clerk
By: Deputy Clerk

ENTERED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRRISONBURG DIVISION

PORTIA BASS	)	
Plaintiff,	)	Case No. 5:00CV00064
	)	
v.	)	ORDER
	)	
	)	By: Jackson L. Kiser
E.I. DUPONT DE	)	Senior United States
NEMOURS & CO.,	)	District Judge
	)	
Defendant.	)	

Before the Court are the Motions for Attorney's Fees and for Sanctions by the Defendant E.I., DuPont de Nemours and Company ("DuPont") [Document 116]. The parties have briefed the issues and have been heard at oral argument. The motions are therefore ripe for disposition.

For the reasons stated in the accompanying Memorandum Opinion, the Motion for Attorney's Fees is GRANTED, and the Defendant is awarded fees in the amount of $10,968.69. The Defendant's Motion for Sanctions must be DENIED. Nonethelesss, because the conduct in question so warrants, the

court will impose sanctions on its own motion. Counsel for the Plaintiff is hereby ORDERED to pay into court the amount of $1000.00.

The Clerk is directed to send a certified copy of this Order to all counsel of record. Any pending motions are to be dismissed as moot and the clerk is directed to strike this case from the docket.

Entered this 25th day of July, 2002.

/s/ Jackson L. Kiser
Senior United States District Judge

A True Copy : Teste:
John F. Corcoran, Clerk
By: Deputy Clerk

Clerk's Office U.S. Dist. Court
At Harrisonburg, Va
Filed Jul 25 2002
John F. Corcoran, Clerk
By: Deputy Clerk

ENTERED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRRISONBURG DIVISION

PORTIA BASS	)
Plaintiff,	) Case No. 5:00CV00064
	)
v.	) MEMORANDUM OPINION
	)
	) By: Jackson L. Kiser
E.I. DUPONT DE	) Senior United States
NEMOURS & CO.,	) District Judge
	)
Defendant.	)

Before me are the Motions for Attorney's Fees and for Sanctions brought by the defendant, E.I. DuPont de Nemours and Company ("DuPont"). For the reasons stated herein, I am of the opinion that the Motion for Attorney's Fees should be GRANTED, and that DuPont should be awarded fees in the amount of$ 10,968.69. The Motion for Sanctions brought by the defendant must be DENIED. Nonetheless, because I find that the conduct in question so warrants, I will, on my own motion, impose sanctions against counsel for the plaintiff in the amount of $1000.00.

I. Background

The facts of this case have been discussed fully in my Memorandum Opinion entered on December 26, 2001. Therefore, only a brief review of the procedural history in this case is necessary.

On August 7, 2000, the plaintiff, Portia Bass ("Bass"), brought this suit, alleging a plethora of wrongs, including discrimination and retaliation in violation of Title VII, 42 U.S.C. § 2000e (1999); wage-based discrimination in violation of the Equal Pay Act, 29 U.S.C. §§ 206(d) (1999); defamation; wrongful discharge in violation of Virginia Code § 40.1-51.2:1 (*Bowman* claim); spoliation of evidence; conspiracy in violation of42 U.S.C. § 1985(3) (1999); conspiracy in violation of Bass's constitutional rights (*Bivens* claim); and state-law conspiracy. On December 15, 2000, I dismissed the counts alleging wrongftil discharge, defamation, spoliation, and tortious interference. I then granted Bass's motion for entry of final judgment with respect to these claims. Bass appealed the dismissal, and the Fourth Circuit Court of Appeals later affirmed.

On March 19, 2001, I dismissed the claims alleging a hostile environment based on race, gender and age in violation of Title VII. I also dismissed Bass's conspiracy claims. In support of these claims, Bass alleged that the Equal Employment Opportunity Commission (EEOC) held meetings with DuPont from which she was excluded, refused to let her review DuPont's response to her EEOC charge and, either destroyed or failed to make a record of its investigation into her EEOC charge against DuPont. I found that these factual allegations were wholly insufficient to support Bass's allegations of conspiracy against DuPont. Indeed, I found the

conspiracy claims to be frivolous. DuPont subsequently filed a motion for sanctions against Bass's attorney for filing the conspiracy claims.

Finally, on December 26, 2001, I granted summary judgment on Bass's remaining claims, which alleged discrimination and retaliation on the basis of race and gender in violation of Title VII, age discrimination in violation of the Age Discrimination in Employment Act (ADEA) and wage discrimination on the basis of gender in violation of Title VII and the Equal Pay Act(EPA). In doing so, I dismissed all pending motions as moot. I subsequently awarded costs to DuPont in the amount of $3,627.26. Bass noticed an appeal of the orders issued March 19, 2001 and December 26, 2001 as well as the order awarding costs.

After Bass noticed the appeal, DuPont renewed its motion for sanctions. DuPont seeks sanctions in the form of attorney's fees for defending against the conspiracy claims. The fees sought for both pre-trial and appellate work total $15,321 .87.[1]

DuPont also has moved for attorney's fees. Pursuant to 42 U.S.C. § 1988(b) (1999), DuPont seeks $4,171.30 in fees for defending against the claim alleging conspiracy in violation of 42 U.S.C. § 1985. DuPont also seeks $17,766.09 in attorney's fees for defending against the claims alleging wage discrimination on the basis of race and gender in violation of Title VII. The attorney's fees sought total $21,937.39.

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[1] Bass noticed an appeal of the March 19, 2001 order dismissing the conspiracy and hostile environment claims. The Fourth Circuit heard argument, but subsequently dismissed Bass's appeal of that order because no final judgment had been entered.

II. Discussion

As an initial matter, Bass contends that this court does not have jurisdiction to decide these motions because the claims that are the subject of the fee request are currently on appeal before the Fourth Circuit. Contrary to Bass's contention, in *White v. New Hampshire Dep't of Employment Sec.*, the U.S. Supreme Court held that a motion for, attorneys' fees under Section 1988(b) was collateral to the main cause of action. 455 U.S. 445, 452, 102 S.Ct. 1162,71 L.Ed.2d 325 (1982). Thus, DuPont's motion for attorney's fees is collateral to the main cause of action, which is currently on appeal before the Fourth Circuit. This court therefore retains jurisdiction over the motion. Relying on White, the Fourth Circuit has similarly held that a district court retains jurisdiction over a motion for sanctions under Rule 11 even after a notice of appeal has been filed. *Langham-Hill Petroleum Inc., v. Southern Fuels Co.*, 813 F.2d 1327, 1330-31(4th Cir. 1987), cert. denied, 484 U.S. 829, 108 S.Ct. 99,98 L.Ed.2d 60(1987). Thus, the court retains jurisdiction over DuPont's motion for sanctions as well.

A. Sanctions

By signing a pleading, written motion, or other paper, an attorney certifies that "to the best of her knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. P. 11 (b)(3). If an attorney signs a pleading or other paper that contains allegations without evidentiary support, and are unlikely to have such support, the attorney may be subject

to sanctions. Fed. RI Civ. P. 11(c). An attorney's obligations with respect to the content of pleadings or other papers are not measured solely as of the time they were filed, but include reaffirming to the court and advocating positions contained in those papers after learning that they have no merit. Fed. R. Civ. P. 11 advisory committee's note.

Sanctions may be initiated by either a party or by the court. Fed. R. Civ. P. 11(c). A motion for sanctions made by a party must be served on the. alleged violator twenty-one days before the motion is filed with the court. Fed. R. Civ. P. 11 (c)(1)(A). This "safe harbor" is intended to give the alleged violator an opportunity to withdraw or correct the offending pleading or other paper. The advisory committee's note accompanying Rule 11 explains that, given the intent behind the "safe harbor" provision, "a party cannot delay serving its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention)." Fed. R. Civ. P. 11 advisory committee's note; see also *Howell v. Nesbit*, 149 F.3d 1168, 1998 WL 325870, at *3 (4th Cir. June 16, 1998) ("[S]ervice and filing [of a motion for sanctions] must occur prior to final judgment or judicial rejection of the offending contention."); *Barber v. Miller*, 146 F.3d 707, 710-711 (9th Cir. 1998)(holding that a district court cannot grant a motion for sanctions first submitted to it after the court disposes of the offending claims); *Ridder v. City of Springfield*, 109 F.3d 288, 295 (6th Cir. 1997) ("A Rule 11 motion cannot be made unless there is some paper, claim, or contention that can be withdrawn.").

In its motion for sanctions, DuPont contends that counsel for Bass violated Rule 11 by asserting the conspiracy claims even though they were without any evidentiary support and were unlikely to have such support after discovery. I agree with DuPont. Bass's fantastical conspiracy claims in which she

alleged that the EEOC and DuPont conspired against her were based on mere speculation. The complaint did not allege any facts that would support a finding that DuPont and the EEOC had entered into any type of agreement whatsoever. Indeed, the facts alleged in the omplaint gave Bass's attorney no reason whatsoever to believe that the EEOC had entered into a conspiracy with DuPont. Nor would any reasonable attorney have concluded, based on the facts alleged, that evidence to support such claims was forthcoming.

Nonetheless, I cannot grant DuPont's motion for sanctions. DuPont filed its motion for sanctions approximately three months after the conspiracy claims were dismissed. Although DuPont served the motion on Bass's attorney twenty-one days before filing it with the court, she could not have withdrawn the claims at that time because they had already been disposed of by the court. Because DuPont's motion for sanctions was not served and filed before the conspiracy claims were disposed of, I cannot grant it.

DuPont contends that the court can impose sanctions against Bass's attorney for appealing the dismissal of the conspiracy claims.[2] DuPont argues that, by filing the appeal, Bass's attorney reaffirmed the positions she took in the complaint regarding the conspiracy claims. In filing the appeal, counsel for Bass has continued to advocate the positions she took in the complaint, but not before this court. The appeal was filed with the Fourth Circuit Court of Appeals. It is not the role

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[2] Although DuPont also moved for sanctions against Bass and her attorney, sanctions usually are imposed against the person signing, filing, submitting, or advocating the offending paper. Fed. R. Civ. P. 11 advisory committee's note. In this case, that person would be Bass's attorney.

of a district court to sanction parties for filing frivolous appeals. Were it otherwise, Rule 11 could become a tool used by litigants to discourage their opponents from filing appeals. If the Fourth Circuit finds that the appeal is frivolous, that court may impose sanctions pursuant to Federal Rule of Appellate Procedure 38. Indeed, pursuant to Rule 38, DuPont may file a motion for sanctions with the Fourth Circuit.

All of that said, the court can impose sanctions on its own motion. Fed. R. Civ. P. 1 l(c)(I)(B). The "safe harbor" provision does not apply when the court, rather than a party, initiates sanctions. In such cases, the offending party Is entitled only to notice and a reasonable opportunity to respond. Fed. R. Civ. P. 11(c). DuPont's motion for sanctions placed Bass's attorney on notice that she might be subject to sanctions for asserting the conspiracy claims. Bass's attorney had an opportunity to respond to the allegation that she violated Rule 11 at the hearing that was held on DuPont's motion for sanctions. DuPont's motion was prompted by the same conduct as that for which the court is imposing sanctions. Thus, no further proceedings are necessary. As I have already indicated, the conspiracy claims put forth by Bass's attorney lacked any evidentiary support and were unlikely to have evidentiary support even after discovery. 1 will therefore impose sanctions against counsel for Bass in the amount of $1000.00.

B. Attorney 's Fees

Section 1988(b) of Title 42 of the U.S. Code confers authority on district courts to award reasonable attorney's fees to the prevailing party in certain types of civil rights suits, including cases brought under 42 U.S.C. § 1985. Defendants as well as plaintiffs are entitled to an award of fees. *Lotz Realty Co., Inc. v. US. Dept. of Housing and Urban Development*, 717

F.2d 929,931(4th Cir. 1983). However, the standard for deciding a defendant's motion for attorney's fees is different from that used when a plaintiff has made the motion. For a defendant to succeed, he must show that the plaintiffs claim "was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Lotz*, 717 F.2d at 931.

In suits brought under Title VII, courts also may award reasonable attorney's fees to a prevailing party. See 42 U.S.C. § 2000e-5(k) (1999) ("In any action or proceeding under this title the court, in its discretion, may allow the prevailing party... a reasonable attorney's fee."). The standard for granting attorney's fees under Title VII is identical to the standard applied under Section 1988. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983); *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1359 n.lO (4th Cir. 1995). A district court may in its discretion award attorney's fees to a prevailing defendant upon a finding that the plaintiffs action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith. *Christiansburg Garment Co. v. EEOC*, 434U.S.412, 421,98 S.Ct. 694,700, 54L.Ed.2d648 (1978).

DuPont prevailed on all counts of Bass's complaint, and therefore qualifies as a prevailing party within the meaning of Title VII and Section 1988. I have already found that the claim alleging conspiracy in violation of Section 1985 was frivolous. Consequently, DuPont is entitled to an award of reasonable attorney's fees for defending against that claim. DuPont also is entitled to recover reasonable attorney's fees for defending against the wage-based Title VII claims, which alleged discrimination on the basis of race and gender. Bass failed to produce a single comparator who was paid more than her and

held a job that required skill, effort, and responsibility equal to that required by her job and which was performed under working conditions similar to hers. By way of example, one of the comparators Bass proffered held a plant-wide management position even though Bass had no management responsibilities. Her allegations of wage discrimination were based entirely on speculation. They were without any foundation whatsoever. I therefore find that DuPont is entitled to reasonable attorney's fees under Title VII.

Once a court determines that a prevailing defendant is entitled to attorney's fees, it must determine whether the requested fees are reasonable. *Lotz*, 717 F.2d at 932. In so doing, the court must consider the twelve factors set forth in *Barber v. Kimbrell 's, Inc.*, 577 F.2d 216, 226 (4th Cir. 1978). Under Barber, the court must consider:

> (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases.

577 F.2d at 226 n.28. These factors should be considered in determining a reasonable rate and reasonable hours, which are

then multiplied to determine the lodestar figure, which will normally reflect a reasonable fee. *EEOC v. Service News Co.*, 898 F.2d 958, 965 (4th Cir. 1990).

According to the affidavit and billing statements submitted by DuPont's attorneys, three attorneys spent approximately 117.9 hours defending against the Title VII wage claims and a total of 21.7 hours defending against the Section 1985 claim. Because some of the hours spent working on the Section 1985 claim and the Title VII wage claims also contributed toward defending against Bass's other claims, the fee request includes only a fraction of those hours. I find this to be a reasonable approach given the similarity between the compensable and noncompensable claims. Furthermore, based on my review of the billing statements submitted by DuPont, I find the number of hours allotted to the Section 1985 claim and the Title VII wage claims as a proportion of the total number of hours spent on the case to be reasonable.

After a review of the relevant *Barber* factors, I find that DuPont's counsel expended a reasonable number of hours on the claims at issue given the skill of the attorneys, the nature of the questions raised, and the results obtained. In reaching this conclusion, I have considered the affidavit submitted by DuPont in which an experienced attorney who practices employment law in this area opines that the number of hours spent on the claims at issue was reasonable. The Title VII claims required DuPont's attorneys to contact and interview twenty comparators identified by Bass, time consuming work appropriately completed by a junior associate. The Section 1985 claim required not only pre-trial work, but also had to be briefed and argued before the Fourth Circuit because of an untimely appeal

by Bass.[3] Much of this work was appropriately completed by the experienced staff attorney who appears to have managed the case. While none of the claims at issue raised particularly novel questions, they were made more complex and time consuming by Bass's difficult to comprehend first complaint and by her willingness to make allegations that had no foundation. In order to "clear the smoke" created by the plaintiff's tactics, DuPont's attorneys were required to undertake more investigation than otherwise might have been necessary. Nonetheless, DuPont's attorneys succeeded in having all counts of Bass's complaint dismissed prior to trial, including the claims at issue here. Finally, I am of the opinion that the hours are not out of line with the time spent on other similar civil rights cases that have come before this court.

Counsel for Bass claims that DuPont has inflated the number of hours spent by its attorneys on these claims. This allegation is based on the same type of speculation and conclusory reasoning as the claims that this court has found to be frivolous and without foundation. For example, Bass points out that DuPont's billing statements show that one of its attorneys spent time reviewing her interrogatories and document requests on a date three days before they were served on DuPont. Bass characterizes this likely clerical error as a "bold[] misrepresent[ation]" and "an attempt to inflate the fees and intimidate Plaintiff and her counsel." Pl.'s Mem. in Opp'n at 9. After reviewing the billing statements, I can find no indication that DuPont's attorneys have inflated the number of hours that they spent on the claims at issue. Indeed, given that the fee request is based on actual bills sent to DuPont by its attorneys, I find that the number of hours claimed is the product

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[3] See my comments at Note 1.

of "billing judgment." *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983).

A reasonable hourly rate is based on the prevailing market rate commanded by lawyers of similar skill, experience, and reputation in the relevant community. *Blum v. Stenson*, 465 U.S. 886, 895, 104 S.Ct. 1541, 1547, 79 L.Ed.2d 891 (1984); *Trimper v. City of Norfolk*, 58 F.3d 68, 75-76 (4th Cir. 1995). The determination of the reasonable rate is a fact intensive exercise requiring the fee applicant to produce "specific evidence" of prevailing market rates in the relevant community for similar services in similar circumstances. *Spell v. McDaniel*, 824 F.2d 1380, 1402 (4th Cir. 1987). The relevant market for determining the prevailing rate is ordinarily the community in which the court where the action is prosecuted sits. *Rum Creek Coal Sales, Inc. v. Caperton*, 31 F3d 169, 175 (4thCir. 1994).

I find that the hourly rates charged by DuPont's attorney's in this case are in line with the prevailing market rates in the Western District of Virginia for similar work in similar types of cases. The three attorneys who worked on this case worked the following number of hours at the noted average hourly rates:

Attorney	**Hours**	**Average Hourly Rate**	**Lodestar**
Junior Associate	109.7	$143.38	$15.757.46
Staff Attorney	23.6	$194.25	$ 4,584.30
Partner	4.0	$277.50	$ 1,110.00
	2.1	$231.25	$ 485.63
Total	139.4		$21,937.39

The vast bulk of these hours represent work by a junior associate, which kept the average hourly rate at $161.25. The

fees charged in this case ranged from approximately $132 to $277.50 per hour. As I have already mentioned, DuPont has submitted an affidavit from an attorney who has nearly thirty years of experience practicing employment law in the Western District of Virginia. That affidavit indicates that the fees customarily charged in this area for the type of work done by DuPont's attorneys ranges from $125.00 to $300.00 per hour, depending on experience and specialization. The hourly rate charged in this case ranged from $132.00 to $277.50 per hour, rates that fall within the range identified in the affidavit. The average hourly rate charged for the junior associate who worked on this case and who had no experience or specialization was $143.38, a rate near the bottom of the range identified in the affidavit. The average hourly rates charged for the partner who worked on this case and who has nearly twenty years of experience as a litigator in employment cases was $231.25 and $277.50. These rates fall within the range identified in the affidavit as encompassing the prevailing market rates in this area. Moreover, these rates are in line with the rates charged by the affiant, who has charged up to $250.00 per hour for similar work. Finally, the average hourly rate charged for the staff attorney who has nearly a decade of experience defending against civil rights suits was $194.25, a rate appropriately in the middle of the range identified in the affidavit. Based on this evidence, I find that the rates charged by DuPont's attorneys for work on the claims at issue here are comparable to the rates charged by attorneys of similar skill, experience, and reputation in the Western District of Virginia.

Relying upon *Scearce v. Halifax County*, 94-0020-D, U.S. Dist. Lexis 9176 (W.D. Va. May 26, 1995), Bass argues that the maximum hourly rate charged by attorneys in this area is $150.00 per hour. In *Scearce*, however, the court merely found that a rate of $1 50.00 per hour was "entirely reasonable in the

central Virginia legal community, given counsel's experience and the rates other attorneys in the Western District of Virginia charge for similar services." *Id.* at * 10. Moreover, the rate discussed in *Searce* of $1 50.00 per hour is remarkably consistent with the average hourly rate charged in this case of $161.25 per hour.

Having determined that the hours and hourly rates in this case were reasonable, I must determine whether the resulting lodestar figure of $21,937.39 should be adjusted based on any of the remaining *Barber* factors or other appropriate criteria. *See Blum v. Stenson*, 465 U.S. 886, 888, 104 S.Ct. 1541, 1544,79 L.Ed.2d 891 (1984) ("Adjustments to that fee then may be made as necessary in the particular case."); *Arnold v. Burger King Corp.*, 719 F.2d 63, 67 (4th Cir. 1983). One of the criteria the court should consider is the relative financial positions of the litigants. *DeBauche v. Trani*, 191 F.3d 499,511 (4thCir. 1999);*Arnold*, 719F.2d at 68. "The policy of deterring frivolous suits is not served by forcing the misguided. .. plaintiff into financial ruin simply because he prosecuted a groundless case." *Arnold*, 719 F.2d at 68. A fee award reduced to reflect the losing party's financial position is particularly appropriate when, as here, the defendant is capable of absorbing a reasonable share of its legal fees without hardship. *Id.*

Bass has submitted tax returns indicating that, for the past two years, she has had an annual income of $6,602 and $7,715 respectively. DuPont contends that this evidence is insufficient to establish Bass's financial position. DuPont points out that for fifteen years Bass was a well-paid professional at DuPont, suggesting that Bass may have assets that do not appear on her tax returns. DuPont also points out that Bass apparently has no dependents. Even assuming DuPont is correct, I have taken judicial notice of several facts. First, I have taken judicial notice

of certain publicly- available financial disclosure forms that Bass proffered to the court indicating that her assets are modest. Second, I have taken judicial notice of the fact that Bass is related to her attorney, and thus probably has not funded this litigation in full. These observations in combination with Bass's modest annual income lead me to conclude that an award of attorney's fees equal to the amount requested would constitute and excessive burden on Bass. Thus, I will reduce the award to fifty percent of the amount requested, or $10, 968.69.

III. Conclusion

For the reasons stated herein, the defendant's Motion for Sanctions is DENIED. The court nevertheless will impose sanctions on its own motion. The plaintiff's attorney is ORDERED to pay into court the amount of $1000.00. The Motion for Attorney's Fees is GRANTED, and the Defendant is awarded fees in the amount of $10,968.69.

The Clerk is direct to end a certified copy of this Memorandum Opinion to all Counsel of Record.

/s/ Jackson L. Kiser
Senior United States District Judge

A True Copy : Teste:
John F. Corcoran, Clerk
By: Deputy Clerk

28 U.S.C. § 1920

A judge or clerk of any court of the United States may tax as costs the following:
(1) Fees of the clerk and marshal;
(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
(3) Fees and disbursements for printing and witnesses;
(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
(5) Docket fees under section 1923 of this title;
(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.
A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

42. U.S.C. §19889(b)

In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980, and 1981 of the Revised Statutes , 42 U.S.C. §§ 1981-1983, 1985, 1986, title IX of Public Law 92-318 20 U.S.C. §§ 1681 et seq., the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d et seq., or section 40302 of the Violence Against Women Act of 1994, the court, in its discretion, may allow the prevailing party other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.